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CALIFORNIA REPORTER

IN VOLUME

41 PACIFIC REPORTER

SECOND SERIES

2 Cal.2d 324

In re LAVINE.
S. F. 15188.

Supreme Court of California.
Jan. 30, 1935.

As Modified on Denial of Rehearing
Feb. 28, 1935.

1. Statutes ☞216

In construing statute, courts are governed solely by language employed and are not bound by opinions of individual members of legislative body.

2. Attorney and client ☞14

Right to practice law not only presupposes in its possessor integrity, legal standing, and attainment, but also exercise of special privilege, highly personal and of nature of a public trust.

3. Attorney and client ☞1

Granting of right to practice law is a judicial function; privilege being one extended solely by virtue of order of Supreme Court.

4. Attorney and client ☞1

Legislature may prescribe reasonable rules and regulations for admission to bar, but cannot deprive courts of inherent power of prescribing additional conditions, nor take from them right and duty of making actual orders of admission.

5. Attorney and client ☞1

Courts, in their inherent power, may demand more from applicant for admission to bar than Legislature has required.

6. Attorney and client ☞61

Application for reinstatement of disbarred attorney must be treated as application for admission to practice and not as application to vacate disbarment order, and, as such, must be addressed to court having jurisdiction to admit attorney to practice and be accompanied by satisfactory showing of moral rehabilitation of applicant.

7. Attorney and client ☞61

Presentation of full pardon granted to disbarred attorney does not, without more, satisfy burden resting on disbarred attorney to show that he possesses moral stamina essential to one qualified to practice law (St. 1933, p. 2476, § 1; Const. art. 7).

8. Attorney and client ☞1

Constitutional law ☞52

Pardon statute, in so far as purporting to reinstate or direct reinstatement of disbarred attorney without showing of moral rehabilitation, held unconstitutional as legisla-

tive encroachment upon courts' inherent power to admit attorneys to practice and as tantamount to vacating of judicial order by legislative mandate (St. 1933, p. 2476, § 1; Const. art. 7).

9. Constitutional law ☞18

Presumption existed that constitutional provision granting pardoning power to Governor was adopted with court's construction of similar provision in prior Constitution in mind (Const. art. 7).

In Bank.

Proceeding in the matter of the application of Morris Lavine for reinstatement to the State Bar of California.

Application denied, without prejudice.

Morris Lavine, of Los Angeles, in pro. per.

Norman S. Sterry, Louis W. Myers, and Philbrick McCoy, all of Los Angeles, for respondent State Bar.

WASTE, Chief Justice.

It appears that in 1918 the petitioner was admitted to practice law in all the courts of this state. This privilege was taken from him in 1930 by his disbarment, under order of this court entered pursuant to the provisions of section 299 of the Code of Civil Procedure, upon his conviction of attempted extortion, an offense involving moral turpitude, for which offense he was sentenced to imprisonment in the county jail for one year, which term he served, and to pay a fine of \$5,000. On January 16, 1934, the Governor granted petitioner a full pardon; the fine being thereby remitted. Based solely upon this pardon, and without any effort being made to establish his moral rehabilitation, petitioner now asks for reinstatement to the bar of California. He refers us to the so-called "pardon statute" (Stats. 1933, p. 2476), section 1 of which provides as follows: "In all cases in which a full pardon has been granted by the Governor of this State or will hereafter be granted by said Governor to a person convicted of an offense to which said pardon applies, it shall operate to restore to such convicted person, all the rights, privileges, and franchises of which he has been deprived in consequence of said conviction or by reason of any matter involved therein; provided, that nothing herein contained shall abridge or impair the power or authority conferred by law on any board or tribunal to revoke or suspend any such right, privilege or franchise for any act or omission not involved in said conviction;

provided, further, that nothing in this act shall affect any of the provisions of the Medical Practice Act or the power or authority conferred by law on the Board of Medical Examiners therein, or the power or authority conferred by law upon any board that issues a certificate which permits any person or persons to apply his or their art or profession on the person of another."

Many arguments addressed to the constitutionality of this statute are advanced and presented at great length in the briefs filed by the petitioner and the representatives of the State Bar. We have read the several briefs and have in mind the numerous contentions therein advanced. We shall not attempt to treat and dispose of them individually, except in so far as our conclusion achieves this result, but will direct our attention to the reasoning and authorities which, in our opinion, are determinative of the present application. Reduced to its simplest terms, the present proceeding requires us to determine whether a pardon, standing alone and unsupported by evidence of moral rehabilitation, requires this court, wherein is vested the power to admit, suspend, or disbar attorneys at law, to reinstate an attorney who has forfeited his right to practice by reason of his conviction of an offense involving moral turpitude.

[1] Prior to the adoption of the 1933 statute, above quoted, it was held that the granting of a full pardon to an attorney so disbarred, did not, of itself, entitle such attorney to reinstatement. *Matter of Application of Riccardi*, 64 Cal. App. 791, 222 P. 625. Inasmuch as the privilege of practicing law is one extended to an individual solely by virtue of an order of this court, and is not one governed by a "board," within the meaning of the proviso of the above statute, we are satisfied that the language of said statute is sufficiently comprehensive to achieve the result for which petitioner contends, and we therefore find it unnecessary to attach any weight to a letter, copy of which accompanies the petition, addressed to petitioner by the author of the bill introduced in the Legislature, and which later became the statute here involved, wherein it is stated that the "object in introducing this bill [was] to bring about the full restoration to all rights and privileges, and particularly to the restoration of the practice of law of those who had been convicted of a crime and upon a review of the cause by the Governor, had been granted a full pardon." In construing a statute we are to be governed solely by the language employed, and are not bound by the

opinions of individual members of the legislative body. *Ex parte Goodrich*, 160 Cal. 410, 417, 117 P. 451, Ann. Cas. 1913A, 56. The statute obviously having as one of its principal purposes the reinstatement of attorneys receiving an executive pardon of the offense upon conviction of which their disbarment was ordered, we pass now to a consideration of the propriety of legislation purporting to have this effect.

[2-5] The decisions of this court indicate, and they are supported by a wealth of authority from other jurisdictions, that the right to practice law not only presupposes in its possessor integrity, legal standing, and attainment, but also the exercise of a special privilege, highly personal and partaking of the nature of a public trust (*Townsend v. State Bar*, 210 Cal. 363, 364, 291 P. 837), the granting of which privilege to an individual is everywhere conceded to be the exercise of a judicial function. *Brydonjack v. State Bar*, 208 Cal. 439, 443, 281 P. 1018, 66 A. L. R. 1507. This is necessarily so. An attorney is an officer of the court, and whether he shall be admitted is a judicial, and not a legislative, question. However, notwithstanding the inherent power of the courts to admit applicants for licenses to practice law, it is generally conceded that the Legislature may prescribe reasonable rules and regulations for admission to the bar which will be followed by the courts. The regulations so prescribed must, as stated, be reasonable and shall not deprive the judicial branch of its power to prescribe additional conditions under which applicants shall be admitted, nor take from the courts the right and duty of actually making orders admitting them. *In re Chappelle*, 71 Cal. App. 129, 131-132, 234 P. 906; *Brydonjack v. State Bar*, *supra*. In short, such legislative regulations are, at best, but minimum standards unless the courts themselves are satisfied that such qualifications as are prescribed by legislative enactment are sufficient. The requirements of the Legislature in this particular are restrictions on the individual and not limitations on the courts. They cannot compel the courts to admit to practice a person who is not properly qualified or whose moral character is bad. In other words, the courts in the exercise of their inherent power may demand more than the Legislature has required. *In re Chappelle*, *supra*; *In re Bailey*, 30 Ariz. 407, 248 P. 29, 30; *In re Day*, 181 Ill. 73, 54 N. E. 646, 650, 50 L. R. A. 519; *In re Opinion of the Justices*, 279 Mass. 607, 180 N. E. 725, 727, 81 A. L. R. 1059; *Splane's Petition*, 123 Pa. 527, 16 A. 481, 483.

[6, 7] These principles are well settled. It is equally well established that an application for reinstatement of an attorney disbarred by a judgment of a court of competent jurisdiction, as was petitioner, must be treated as an application for admission to practice and not as an application to vacate the order of disbarment. As such it must be addressed to the court having jurisdiction to admit an attorney to practice (*Danford v. Superior Court*, 49 Cal. App. 303, 305, 193 P. 272), and must be accompanied by a satisfactory showing of the moral rehabilitation of the applicant. The mere presentation of a pardon, without more, by an applicant, situated as is petitioner here, does not, in our opinion, satisfy the burden resting on him of showing that he possesses that moral stamina essential to one qualified to engage in the practice of the law, for it has been held that while a pardon obliterates an offense to such an extent that for all legal purposes the one-time offender is to be relieved in the future from all its results, it does not obliterate the act itself. It puts the offender in the same position as though what he had done never had been unlawful, but it does not close the judicial eye to the fact that once he had done an act which constituted the offense. *U. S. v. Swift* (D. C.) 186 F. 1002, 1016; *People v. Weber*, 26 Colo. 229, 57 P. 1079, 1080. In other words, while the effect of a pardon is to relieve the offender of the penal consequences of his act, it does not restore his character and cannot reinvest a person with those qualities which are absolutely essential for an attorney at law to possess or rehabilitate him in the trust and confidence of the court. *Nelson v. Commonwealth*, 128 Ky. 779, 100 S. W. 337, 338-340, 16 L. R. A. (N. S.) 272. The very essence of a pardon is forgiveness or remission of penalty. *State v. Hazzard*, 139 Wash. 487, 247 P. 957, 47 A. L. R. 538. It implies guilt, and does not wash out the moral stain. *Nelson v. Commonwealth*, supra. We recognize that authorities to the contrary are available, but we are neither impressed with nor bound by their reasoning.

[8] With these principles before us, we conclude that in so far as the 1933 "pardon statute" purports to reinstate, or to direct this, or any other, court to reinstate, without any showing of moral rehabilitation, an attorney who has received an executive pardon of the offense upon the conviction of which his disbarment was based, the same is unconstitutional and void as a legislative encroachment upon the inherent power of this court to admit attorneys to the practice of the law,

and is tantamount to the vacating of a judicial order by legislative mandate.

A somewhat analogous situation was presented in *Re Cannon*, 206 Wis. 374, 240 N. W. 441, 450, wherein an attorney was suspended from practice for two years. His reinstatement at the end of the period was made conditional upon his payment of the costs of the proceedings and desisting during that time from a repetition of improper conduct. He subsequently applied for readmission to the court alleging his good conduct during the period of suspension, but without showing the payment of the costs, and in support of his claim for reinstatement relied upon an act of the Legislature, passed after his suspension, which provided that the costs imposed upon him by the judgment were remitted by the state and authorizing him "henceforth to exercise all the rights and privileges of a duly licensed member of the bar." In declaring the statute unconstitutional, the court declared:

"We think the separation of sovereign power by which the Constitution assigns the legislative power to the Legislature and the judicial power to the courts, with the purpose of making each department supreme and independent in its respective field, accords to the Legislature the power of exacting of those who shall be admitted to the practice of the law such qualifications as the Legislature shall deem sufficient to protect the public from the evils and mischiefs resulting from incompetent and characterless attorneys, which qualifications so prescribed must be respected by the courts. The courts cannot and should not license any as attorneys at law who do not possess the qualifications deemed by the Legislature necessary for the protection of the public interest. * * *

"While the Legislature may legislate with respect to the qualifications of attorneys, its power in that respect does not rest upon any power possessed by it to deal exclusively with the subject of the qualifications of attorneys, but is incidental merely to its general and unquestioned power to protect the public interest. When it does legislate fixing a standard of qualifications required of attorneys at law in order that public interests may be protected, such qualifications constitute only a minimum standard and limit the class from which the court must make its selection. Such legislative qualifications do not constitute the ultimate qualifications beyond which the court cannot go in fixing additional qualifications deemed necessary by the court for the proper administration of judicial functions.

There is no legislative power to compel courts to admit to their bars persons deemed by them unfit to exercise the prerogatives of an attorney at law. The power of the court in this respect is limited only to the class which the Legislature has determined is necessary to conserve the public welfare."

[9] In upholding the inherent power of the court to determine who may be admitted to practice, subject to such reasonable and minimum restrictions as the Legislature may prescribe, we do no violence to article 7 of the Constitution, wherein is embodied the grant of the pardoning power to the Governor. This article was taken substantially from section 13 of article 5 of the Constitution of 1849, which was in force when this court declared in *Cohen v. Wright*, 22 Cal. 293, that "the pardoning power does not extend to the reinstatement of an attorney excluded from the practice by law or the order of a Court." Under familiar principles, it will be presumed that the provision in the present Constitution having to do with the pardoning power was adopted with this construction in mind. To give to the "pardon statute" the effect for which petitioner contends would be to enlarge and extend the pardoning power beyond the constitutional grant thereof. This distinguishes the present case from that of *In re Herron*, 217 Cal. 400, 19 P.(2d) 4. Moreover, the opinion in the *Herron* Case did not consider the point above discussed having to do with an infringement of the judicial power.

In view of our conclusion, we find it unnecessary to specifically refer to the many cases cited by petitioner. However, we desire to discuss briefly the case of *Ex parte Garland*, 4 Wall. (71 U. S.) 333, 18 L. Ed. 366, which is so strongly relied on by petitioner. It appears therein that shortly after the Civil War Congress enacted a statute prohibiting any person from appearing before any of the federal courts who had not taken an oath to the effect that he had not aided in the late Rebellion or held office in the Confederate States. The petitioner, Garland, who had been admitted to practice before the United States Supreme Court prior to the Rebellion, had served in the Congress of the Confederate States during the Rebellion and therefore was not in a position to subsequently take the required oath. Upon receiving a full pardon from the President for all offenses committed by his participation in the Rebellion, he moved the court for "permission to continue to practice as an attorney and counselor of the court" without tak-

ing said oath. It is thus immediately apparent that the case did not involve any question as to "admission" or "reinstatement" to the practice of the law. Garland had never been suspended or disbarred from such practice. In the course of its opinion the court declared that the admission or exclusion of attorneys is not the exercise of a ministerial power, but the exercise of a judicial power. It is then concluded, in effect, that the matter called for in the oath required by the act of Congress had no substantial bearing on the individual's qualification to practice law, and that the requirement of the oath was in the nature of a bill of attainder or ex post facto law imposing additional pains and penalties for past offenses, which pains and penalties were relieved by the pardon granted to the petitioner. In substance, that case merely held that the statute involved did violence to certain constitutional provisions. The additional discussion as to the effect of a pardon was unnecessary to the decision. However, if in that case the pardon had served to obliterate the offense for all purposes, as petitioner here, in effect, contends, Garland would have been in a position to take the oath and would not have had to seek exemption therefrom. However, as stated above, a pardon does not have such effect.

That the situation presented in the *Garland* Case was unique was recognized in *Hawker v. New York*, 170 U. S. 189, 18 S. Ct. 573, 577, 42 L. Ed. 1002, wherein it is stated that the *Garland* Case merely determined that: "One who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise [thereof] by the exaction * * * of an oath as to * * * past conduct, respecting matters which have no connection with such profession." The peculiar situation presented in the *Garland* Case is also recognized in *State v. Hazzard*, supra, 958 of 247 P., wherein it is stated that the *Garland* "decision has been robbed of much of its virility by later decisions of the court."

What has been said sufficiently disposes of petitioner's contention that the Legislature, having provided for disbarment by court order upon receipt of a certified copy of the record of conviction, may also provide for the reinstatement of the offender based solely upon an executive pardon. The effect of this reasoning, as already indicated, would be to vacate a judicial order by legislative enactment. Moreover, in our opinion, the provision for disbarment upon receipt of the rec-

ord of conviction constitutes but legislative recognition of the court's inherent power to disbar an attorney convicted of a felony or misdemeanor including moral turpitude. In other words, the power to disbar upon conviction of such an offense reposes in the court and may be exercised in the absence of legislative expression or sanction. This being so, the court cannot be compelled to reinstate the offender upon a legislative declaration that a pardon entitles him to such reinstatement, but may, in the exercise of a sound discretion, require some showing of his moral rehabilitation.

The application for reinstatement is denied without prejudice to petitioner's right to renew his application for reinstatement upon such showing of moral rehabilitation as he may deem essential. Such application, if filed, should be addressed to the Board of Governors of the State Bar, and filed at the State Bar office.

We concur: THOMPSON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; PRESTON, J.



2 Cal.2d 417

PEOPLE v. LANG.

Cr. 3820.

Supreme Court of California.

Feb. 1, 1935.

Criminal law ¶980(2)

Where accused pleaded guilty to murder and court determined from evidence that offense was murder in first degree, court acted within its discretion in imposing death sentence, on failure to find extenuating circumstances in record (Pen. Code, § 190).

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Edward L. Lang was adjudged, after plea of guilty to murder and attempted robbery, to be guilty of murder in the first degree, and sentenced to death, and he appeals.

Affirmed.

Frederick H. Vercoe, Public Defender, and William B. Neeley, William H. Sanson and Ellery E. Cuff, Deputy Public Defenders, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

LANGDON, Justice.

Defendant was jointly charged with Ralph Balicki with murder, attempted robbery, and kidnapping. He pleaded guilty to the first two charges, and the third was dismissed. Testimony as to the degree of the murder charge was taken, and the court determined it to be murder of the first degree, and sentenced the defendant to death.

At the time of sentence, the trial court declared that, unless there were extenuating circumstances in the record, and he could find none, he should impose the death sentence. Defendant appeals, making the contention that the trial court was in error as to the law, in that the discretion in the jury or trial court to impose a sentence of death or of life imprisonment under section 190 of the Penal Code is unlimited, and does not depend upon a showing of circumstances in mitigation.

The contention seems pointless. The trial court, acting within its discretion and upon a consideration of the circumstances, fixed the sentence in accordance with the statutory authority vested in it. This was entirely proper.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

4 Cal.App.2d 500

EVERTS v. ROSENBERG.

Civ. 9064.

District Court of Appeal, Second District,
Division 2, California.

Feb. 11, 1935.

1. Automobiles Ⓒ245(80)

Whether motorist who was struck by automobile approaching from motorist's left at street intersection was contributorily negligent *held* for jury.

2. Trial Ⓒ228(3)

Instruction that allegation of contributory negligence presupposes negligence on part of defendant pleading it *held* not error, since term "presupposes" is synonymous with "implies."

[Ed. Note.—For other definitions of "Implication; Imply," see Words & Phrases.]

3. Trial Ⓒ296(3)

Instruction that violation of provisions of Vehicle Act was negligence as matter of law *held* not erroneous because of failure to instruct that such negligence must proximately contribute to occurrence, where court instructed jury to find for defendant if jury found that defendant was negligent, but that such negligence did not directly and proximately cause accident (St. 1931, pp. 2120, 2126, §§ 113 (a), 131 (a)).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Harold Everts against Max Rosenberg. From a judgment for plaintiff, defendant appeals.

Affirmed.

Lee A. Solomon, of Los Angeles, for appellant.

Raymond F. Body and Hoyt Klinck, both of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal by defendant from a verdict and judgment in favor of plaintiff (respondent) in an action for damages arising out of a collision of automobiles. Plaintiff was driving north while defendant was driving east, both approaching an intersection of two streets. The cars collided at the intersection; the left rear portion of plaintiff's car being struck by the front of defendant's car.

[1] Appellant contends that plaintiff was guilty of contributory negligence as a mat-

ter of law because he placed himself in a position of known danger, but argues mainly that although plaintiff had the right of way he was not thereby relieved from exercising reasonable care. However, he admits eventually on page 14 of his brief that "the evidence in the instant case was exceedingly close upon the question of contributory negligence, and * * * was a question solely for the jury," so that appellant himself disposes of this contention for us.

[2] Appellant next contends that "it was error for the court to instruct the jury that the allegation of contributory negligence 'presupposes' negligence on the part of the defendant pleading it." The term "presupposes" is synonymous with "implies," and in 19 Cal. Jur. 647, we find the following, which is supported by numerous citations: " * * * The doctrine (contributory negligence) implies that there is some negligence on the part of the defendant." The word "presupposes" is as often used in the cases as the word "implies." The instruction is accurate in law; but we do not recommend it because there is a possibility that the jury may infer from the instruction that the defendant by pleading contributory negligence is admitting his own negligence. Such possibility is slight, and instructions similar to the one complained of have been consistently upheld by the appellate courts of this state. *Wiezorek v. Ferris*, 176 Cal. 353, 167 P. 234; *Linforth v. San Francisco Gas & Elec. Co.*, 156 Cal. 58, 103 P. 320, 19 Ann. Cas. 1230; *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 P. 90.

[3] Appellant finally contends that it was error for the court to instruct the jury that the violation of any of the provisions of section 113, subd. a, or section 131, subd. a, of the California Vehicle Act (St. 1923, pp. 553, 560, §§ 113(a), 131(a), as amended by St. 1931, pp. 2120, 2126), was negligence as a matter of law, "unless they were further instructed that such negligence must proximately contribute to the occurrence." This contention is disposed of by the fact that the court did instruct the jury, in substance, as follows: If you find that the defendant was negligent in the operation of his automobile but that "such negligence did not directly and proximately cause the accident, * * * then your verdict will be for the defendant."

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

4 Cal.App.2d 229

PAGE v. PODOL
Civ. 8939.

District Court of Appeal, Second District,
Division 1, California.
Jan. 28, 1935.

1. Husband and wife ⇨14(3)

Property held by husband and wife in joint tenancy constitutes one estate, in which rights of each spouse are identical and coextensive.

2. Internal revenue ⇨7(27)

Both husband and wife became liable for federal income tax on profits from sale of stock held by them as joint tenants (Revenue Act 1928, § 51 (b), 26 USCA § 2051 (b)).

3. Money paid ⇨1

One compelled to pay, or owning property liable for, debt which another in good conscience should pay, may recover amount paid from latter.

4. Taxation ⇨531(1)

Person involuntarily paying taxes, for which another is legally or equitably bound, may recover amount paid from latter.

5. Internal revenue ⇨27(1)

Divorced husband, compelled to pay full amount of deficiency in federal income tax on profits from sale of stock, held by him and his former wife as joint tenants, before divorce, in order to prevent proceedings against him or his property for collection thereof, held entitled to recover half of amount paid from wife; no coercion by commencement of legal proceedings being necessary (Revenue Act 1928, § 51 (b), 26 USCA § 2051 (b)).

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Andrew J. Berry against Harriette M. Podol. Judgment for defendant, and Lulu M. Page, executrix of plaintiff's last will and testament, appeals.

Reversed, with direction.

William Ellis Lady, of Los Angeles, for appellant.

Fred W. Morrison, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

The defendant had judgment in an action brought by her former husband, Andrew J. Berry, to recover one-half of a deficiency in income tax paid by him after dissolution of the marriage on the profits of their dealings

in property held by them in joint tenancy during the marriage relation. Plaintiff died since the trial and an appeal from the judgment is prosecuted by his executrix.

In the years 1927 and 1928 Dr. Berry and the defendant, his then wife, sold certain stock which had theretofore been acquired by their joint efforts and held by them as joint tenants. The husband while he and his wife were living together made a joint income tax return for those transactions and paid the tax computed by him thereon.

All of the property which had been accumulated was equally divided between the parties in 1928 by a written agreement. In 1930 the defendant secured a decree of divorce from her husband in Nevada, subsequently remarrying. After the divorce the commissioner of internal revenue demanded from Dr. Berry the sum of \$4,069.16 claimed to be due the government upon a redetermination of the taxes. Upon formal notices and demands from the commissioner Dr. Berry demanded that his former wife pay one-half of the amount which she refused to do. Dr. Berry then paid the tax claimed and sued to recover one-half of the amount.

[1, 2] The property of the husband and wife held in joint tenancy constituted one estate in which the rights of each were identical and coextensive. *Siberell v. Siberell*, 214 Cal. 767, 7 P. (2d) 1003. When this property was sold both husband and wife became liable for the tax on the profits made. The return was made by the husband under the provisions of the Federal Income Tax Law allowing a single joint return for the income of a husband and wife living together.

The Revenue Act of 1928 provides in section 51(b), 26 USCA § 2051(b): "(b) *Husband and Wife*. If a husband and wife living together have an aggregate net income for the taxable year of \$3,500 or over, or an aggregate gross income for such year of \$5,000 or over—(1) Each shall make such a return, or (2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

The regulations of the Commissioner of Internal Revenue promulgated in connection with that act required the husband to include certain income of his wife in his own return. "The husband shall include in his return the income derived from services rendered by the wife or from the sale of products of her labor if she does not file a separate return or join with him in a return set-

ting forth her income separately." Article 381 of Regulations 74.

[3, 4] Plaintiff relies upon the equitable doctrine that one who is compelled to pay a debt or whose property is made liable for a debt which another in good conscience ought to pay is entitled to recover against that other the amount so paid. In commenting upon this rule the Supreme Court said in *Finnell v. Finnell*, 159 Cal. 535, 539, 114 P. 820, 821: "The soundness of this doctrine has been upheld by innumerable decisions of courts of the highest authority in many jurisdictions, and it is so obviously just and reasonable that it is matter of wonder that it should ever have been called in question." A person who, not acting voluntarily, pays taxes for which another is legally or equitably bound is entitled to recover upon this principle. *Fresno Investment Co. v. Brandon*, 79 Cal. App. 387, 249 P. 548.

Defendant relies upon the case of *Huddleston v. Washington*, 136 Cal. 514, 69 P. 146, in which a remainderman was not allowed to recover from a life tenant taxes paid by her. The court held in that case that as the life tenant must pay the taxes, the action of the remainderman in having the property assessed to her and paying the taxes thereon against the wish of the tenant for life and without her authority made the remainderman a volunteer who could not recover. This is an entirely different situation from the case at bar.

[5] Here the federal government was entitled to the taxes upon the profits made through the sale of the joint property. The original property and the profits thereon were represented by the property which the parties divided equally when they settled their property rights. The fact that the husband made a return for the benefit of his wife either under the provision allowing a joint return by husband and wife, or on behalf of both as joint tenants of the property should not cast upon him the sole liability for the income taxes. He was authorized to make the return for both. He had an interest to protect in making the return and also in paying the deficiency. The government would not accept less than the full amount of the deficiency from him and he was compelled to pay the whole sum to prevent proceedings against him or his property for its collection.

No coercion by the commencement of legal proceedings was necessary. The existence of the liability was sufficient basis for Dr. Berry to make the payment and give him the right

to recover from the defendant one-half the amount paid. *Miller & Lux, Inc., v. Sparkman*, 128 Cal. App. 449, 17 P.(2d) 772.

The judgment is reversed, and the amount of the payment to the government not being disputed, the court below is ordered to enter judgment in favor of the plaintiff for the sum of \$2,034.58, with interest at the rate of 7 per cent. per annum from April 15, 1931.

We concur: CONREY, P. J.; HOUSER, J.



4 Cal.App.2d 513

WAEN v. OHIO FARMERS' INS. CO. et al.

Civ. 9393.

District Court of Appeal, First District,
Division 2, California.

Feb. 13, 1935.

1. Insurance ⇨156(1)

Finding that both insurance company and indemnity company, which together issued combination policy, agreed to indemnify against public liability, *held* unsupported, where insurance company indemnified against damage "to" automobile, and indemnity company, in separate part of policy, indemnified against public liability resulting from damage "by" automobile.

2. Appeal and error ⇨1011(1)

Where evidence sustained findings on conflicting evidence in trial without jury, question of preponderance of evidence could not be considered on appeal.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Annie Waen against the Ohio Farmers' Insurance Company, the Ohio Farmers' Indemnity Company, and others. Judgment for plaintiff against defendants named, and such defendants appeal.

Judgment against the first-named defendant reversed, and judgment against the last-named defendant affirmed.

Young & Young and William K. Young, all of Los Angeles, for appellants.

Vincent W. Hallinan and Emmett R. Burns, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff herein had judgment against Mrs. Dora Lewis for the sum of \$2,000 in an action brought to recover damages for personal injuries sustained in an automobile accident. Said judgment became final, and, after execution had been returned unsatisfied, plaintiff brought this action against Mrs. Lewis' insurance carriers claiming the right to judgment against them under the provisions of Statutes of 1919, c. 367 (page 776). Upon a trial by the court sitting without a jury, plaintiff had judgment against defendants Ohio Farmers' Insurance Company, a corporation, and Ohio Farmers' Indemnity Company, a corporation, from which judgment said defendants appeal.

[1] Appellants state that there are two questions involved on this appeal. The first of these questions as presented by appellants is: "Can a judgment against an insurance carrier be sustained for a loss against which the insurance carrier did not indemnify?" This point arises by virtue of the fact that the two appellants issued what is frequently termed a combination policy, and the trial court gave judgment herein against both appellants. The point is urged solely on behalf of appellant Ohio Farmers' Insurance Company. It is contended by said appellant that the findings of the trial court to the effect that both appellants agreed to indemnify the assured against the loss sustained by reason of the assured's liability to respondent is not sustained by the evidence and is directly contrary to the evidence so far as said appellant is concerned. In our opinion, this contention must be sustained.

While the policies were embodied in one instrument, the portions thereof relating to the respective liabilities assumed by each of the two insurers were kept separate and distinct. We find no ambiguity whatever in the policy. The schedule of coverage by the Ohio Farmers' Insurance Company is headed "Loss of or damage to the automobile 1. Insured by Ohio Farmers Insurance Company." The schedule of coverage by the Ohio Farmers' Indemnity Company is headed, "Loss or damage by the automobile 1. Insured by Ohio Farmers Indemnity Company." It will be noted that one company insured against "loss of or damage to the automobile" while the other insured against "loss or damage by the automobile." Each of said schedules sets forth the nature of the insurance covered by the insurance company named therein, together with the rates, limits, and premium charges. The assured was covered for "pub-

lic liability" by the Ohio Farmers' Indemnity Company only, and not by the Ohio Farmers' Insurance Company. While the warranties of the assured as to both insurers are set forth in but one place, the remaining provisions relating to each of the insurers are separately stated and separately executed by said insurers. In the portion relating to and executed by appellant Ohio Farmers' Insurance Company, we find the following: "This policy is, in all respects, separate and distinct from any other policy to which it may be attached, or which may be issued concurrently herewith on the same automobile, and all risks assumed hereunder are several and not joint." We therefore conclude that the above-mentioned findings are not sustained by the evidence so far as appellant Ohio Farmers' Insurance Company is concerned, and that the judgment against said appellant must be reversed.

[2] The second question as presented by appellants is: "Is an insurance carrier liable upon a judgment obtained by a third person against the assured where by the terms of the policy the same was void because of the fraud of the assured?" In this connection appellants point to the provisions of the above-mentioned statute, where it is provided that an action "may be brought against the company, on the policy and *subject to its terms and limitations.*" (Italics ours.) They then call attention to one of the terms of the policy, which provides: "This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or in case of any fraud, attempted fraud, or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." Appellants raised the issue of fraud by their answer, and the trial court found against appellants on this issue. According to the allegations of the answer, said alleged fraud on the part of the assured consisted of giving appellants, on the day following the accident a false and fraudulent written statement concerning the manner of the happening of the accident. It is now contended that the trial court erred in finding that the assured gave no such written statement, "for the reason that the evidence preponderately shows" that the assured did give such statement. We find no merit in this contention. The assured testified that she gave no such statement, and the only document produced by appellants was a typewritten statement with the assured's name typed at the end thereof. It was claimed by appel-

lants that this was a copy of a written statement which had been signed by the assured, but the original was not produced. While there was a conflict in the evidence as to whether the assured gave such a statement, there was nevertheless ample evidence to sustain the trial court's findings that she did not. We may not therefore deal with the question of the preponderance of the evidence on this appeal.

In view of the conclusions that we have reached, it becomes unnecessary to discuss the remaining points raised by appellants.

The judgment against the defendant Ohio Farmers' Insurance Company, a corporation, is reversed. The judgment against the defendant Ohio Farmers' Indemnity Company, a corporation, is affirmed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**



4 Cal.App.2d 437

COLLINS v. SWORD.

Civ. 1518.

District Court of Appeal, Fourth District,
California.

Feb. 7, 1935.

1. Husband and wife ☞266

Spouses may enter into contracts with each other and change community into separate property of either (Civ. Code, § 158).

2. Husband and wife ☞133(1)

In action by husband against deceased wife's administratrix, finding that property standing in deceased wife's name, other than bank deposit, was her separate property *held* sustained by evidence.

3. Appeal and error ☞1071(1)

In husband's action against deceased wife's administratrix to recover property standing in wife's name, finding that parcel of property not mentioned in amended complaint was wife's separate property *held* harmless, where husband made no claim to it, and admitted that such property belonged to deceased wife.

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action by Richard J. Collins against Mae A. Sword, administratrix of the estate of Honora H. Collins, also known as Honora Collins, deceased. From a judgment for defendant, plaintiff appeals.

Affirmed.

D. Joseph Coyne, of Los Angeles, for appellant.

David J. Keily and Smith & Breslin, all of Los Angeles, for respondent.

MARKS, Justice.

Richard J. and Honora H. Collins were married on November 25, 1885. At that time Mr. Collins had separate property of the value of about \$14,000, and Mrs. Collins had nothing. Mrs. Collins died intestate on May 5, 1929. During the period of coverture considerable property was acquired which consisted of real estate, notes, mortgages, and money in bank. Titles to some of the real estate stood in their names jointly, some in the name of Mrs. Collins, and others in the name of Mr. Collins. Some notes and mortgages were payable to the one and some to the other. Each had separate bank accounts.

After the death of Mrs. Collins, a petition for letters of administration was filed by Mr. Collins, in which the real and personal property standing in her name was described and given a value of about \$40,000. Before this petition was acted upon, Mr. Collins nominated Mae A. Sword to act with him as administratrix of the estate, and a petition for their appointments was filed. Mr. Collins signed both petitions. They were appointed and qualified as administrator and administratrix of the estate and jointly entered upon the discharge of their duties. Letters of administration were issued to them on June 11, 1929. They caused an inventory and appraisal of the property of the estate to be filed. The property here in question was specifically listed as belonging to the estate of Mrs. Collins, and was given an appraised value of \$73,538.10. Both Mr. Collins and Mae A. Sword executed the affidavit usually attached to inventories and appraisements. They gave notice to creditors, approved claims, petitioned for authority to lease real estate and sell real and personal property, and paid the inheritance tax.

On November 7, 1930, Mr. Collins filed his verified petition for discharge as administrator and a "Declaration of Disability" in which he stated that he had exercised his right to declare the real and personal property of the

estate, community property, and proposed to file an action to have the property of the estate declared to be his property because of its former community status. On December 3, 1930, it was ordered that the resignation be accepted nunc pro tunc as of June 23, 1930. This action was filed June 16, 1930.

The amended complaint particularly described various parcels of real property, notes, mortgages, and bank accounts. Some stood in the name of Mrs. Collins, some in the name of Mr. Collins, and others in the names of both. It was alleged that all the property described was community property, and plaintiff sought to have title to all of it vested in him.

After an extended trial the court found that all the property and money held by Mrs. Collins had been given to her out of the community and was her separate property, except part of the cash in the bank which was held to be community property. Plaintiff was given judgment for this money, amounting to \$4,569.08. It was also adjudged that he was the absolute owner of all of the community property standing in his name at the time of Mrs. Collins' death; that the property standing in her name, other than the \$4,569.08, was her separate property and subject to administration in her estate. Plaintiff has appealed from that portion of the judgment favorable to the defendant.

Some of the real estate had been acquired by Mrs. Collins prior to the amendment of section 164 of the Civil Code in 1889 (St. 1889, p. 328), and some of the notes, mortgages, and money prior to the effective date of the amendment of the same section in 1927 (St. 1927, p. 826). Thus the presumptions established by these amendments to the effect that property standing in the name of a wife is her separate property cannot be invoked by defendant as to each class of property acquired before the effective dates of these amendments. However, the trial court found that all the property in question here had been given to Mrs. Collins and was, therefore, her separate property, without regard to the dates on which any of it was acquired. The sole question before us is whether this finding is supported by the evidence.

[1] Since 1872 it has been the rule in this state that property given to a spouse is the separate property of such person. Section 162, Civ. Code. For the same length of time it has also been the rule that a husband and wife may enter into contracts with each other and may change community property into the

separate property of either. Section 158, Civ. Code; 5 Cal. Jur. 346, § 29, and cases cited.

Plaintiff's attack on the questioned finding finds its sole support in the rebuttable presumptions that real property acquired by a married woman prior to March 19, 1889, and personal property acquired by her prior to July 29, 1927, were community property, and in his testimony that all of the property described in the amended complaint was community and that there had been no gift of any part of it to Mrs. Collins. However, when his testimony is studied as a whole, an entirely different picture is presented. Shortly after the marriage he purchased a lot in Los Angeles, erected a building upon it, and had the title placed in Mrs. Collins. He testified that this was a gift to her and was her separate property as he wanted her to own separate property of equal value to the separate property owned by him at the time of marriage. During their long married life they acquired property of considerable value. It seemed to be the desire of each that they each own property of approximately the same total value. Shortly before the death of Mrs. Collins they discussed the values of their several properties and reached the conclusion that the total value of Mrs. Collins' properties was greater than that of those owned by Mr. Collins. He was satisfied with this condition, as they had no children, and he was of the opinion that she should have the greater amount of property as she had the more relatives who were the deserving objects of her bounty, and that they could dispose of their properties by wills. Mrs. Collins consulted attorneys about the preparation of a will, but died before it was executed. She desired to leave Mr. Collins a life estate in the family home with the fee to some of her relatives. Mr. Collins approved of this disposition of this property and made no objection to other bequests she desired to make to other relatives. It was the very apparent idea of both that each was the owner of the property standing in his or her name with the free right of control and disposition without the consent of the other.

The testimony of several witnesses produced by the defendant supports the finding of the trial court that the property in controversy here was the separate property of Mrs. Collins. The actions of Mr. Collins after the death of his wife and up to the time he started this action also support the finding.

[2] The record merely presents a conflict in the evidence on the question we are considering with a preponderance supporting the

questioned finding. The conflict was resolved in favor of defendant by the trial court, and its finding is conclusive here.

[3] Plaintiff complains because the trial court included in the findings and judgment one parcel of real estate not described in the amended complaint and determined that it was the separate property of Mrs. Collins. This is the parcel to which we have already referred as having been given to Mrs. Collins shortly after marriage so that she would have separate property equal in value to that of her husband. Mr. Collins testified that he claimed no interest in this property, and that it was the separate property of Mrs. Collins. As he had no interest in this property, and as it was the separate property of Mrs. Collins, he was not prejudiced by this portion of the judgment. Even though it be admittedly erroneous, it furnishes no ground for a reversal nor necessity for modification of the judgment.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



3 Cal.App.2d 385

BECKJORD v. TRAEGER, Sheriff, et al.
Civ. 8779.

District Court of Appeal, Second District,
Division 2, California.
Jan. 26, 1935.

Rehearing Denied Feb. 25, 1935.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

On rehearing.

For prior opinion, see 39 P.(2d) 523.

George M. Breslin and Henry G. Bodkin,
both of Los Angeles, for appellants.

PER CURIAM.

The petition for rehearing is denied. The opinion is amended in the following particulars:

On page 523 of 39 P.(2d), column 2, at line 18 et seq. the following is stricken out: "Prior to the date of the lease Beckjord had leased the same premises to Silas F. and Margaret F. Slusher. The Slushers had the right to assign their lease." And the following is substituted instead thereof:

"Prior to the date of such lease Beckjord had entered into an agreement regarding a lease of the same premises to Silas F. and Margaret F. Slusher. The Slushers had the right to assign their interests."

On the same page at lines 3 and 4 of the last paragraph a period is placed after the word "into" and the rest of the sentence is stricken out.

Add as the last sentence of the opinion the following: "Appellant claims that the fixtures, alleged to be unlawfully seized and converted, were given too high a valuation by the trial court. We think the trial court was better able to fix such value than we are."



4 Cal.App.2d 502
ROSS v. TISTAERT.
Civ. 9049.

District Court of Appeal, Second District,
Division 2, California.
Feb. 11, 1935.

1. Appeal and error ⌘895(2)

District Court of Appeal, reviewing judgment as if case were being tried de novo, must view evidence in light most favorable to respondent and is not concerned with determining where preponderance of evidence lies.

2. Automobiles ⌘244(43)

In action for damages from automobile collision, evidence held to sustain finding that plaintiff, who made left turn at intersection and drove her automobile directly in front of defendant's automobile without signaling for a left turn, was contributorily negligent.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Action by Maude M. Ross against Gustave A. Tistaert. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

F. H. Bowers, of Los Angeles, for appellant.

Joe Crider, Jr., of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of defendant (respondent) in an action for damages arising out of an automobile collision. Plaintiff and defendant were driving their automobiles west on San Marino street in Los Angeles. Defendant was driving to the left and rear of plaintiff when the latter suddenly turned left in front of defendant at an intersection and the cars collided. According to the testimony of the defendant, the plaintiff did not give the required arm signal of her intention to turn, and there was other evidence of negligence.

[1] Appellant contends that the defendant was guilty of negligence as a matter of law and argues that the plaintiff was not guilty of contributory negligence. The case is presented on appeal as if the case were being tried de novo, but, of course, this court must view the evidence in the light most favorable to the respondent and it must not concern itself with determining where the preponderance of evidence lies.

[2] The trial court found that both parties were negligent, and that plaintiff was guilty of contributory negligence and rendered judgment for the defendant. It is sufficient to say that there is substantial evidence to support the finding of contributory negligence.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



4 Cal.App.2d 573

McEWAN v. DOMINGUEZ, City Clerk, et al.
Civ. 10242.

District Court of Appeal, Second District,
Division 1, California.

Feb. 14, 1935.

Elections 126(4)

Council candidate, who had resided within councilmanic district for nearly eight years, held entitled to have name placed on sample and official primary ballots, although he had not resided within district for two years preceding election as required by charter, where absence was enforced by foreclosure of mortgage on home, candidate never

intended to abandon district, and made prompt arrangements to return, and did so.

Petition for writ of mandate by Glen H. McEwan against Robert Dominguez, as City Clerk of the City of Los Angeles, and another.

Writ denied.

Dailey S. Stafford, of Los Angeles, for petitioner.

Ray L. Chesbro, City Atty., and G. Ellsworth Meyer, Deputy City Atty., both of Los Angeles, for respondent city clerk.

Loren A. Butts, of Los Angeles, for respondent MacAlister.

PER CURIAM.

The petitioner McEwan, a qualified elector and freeholder within the Eleventh councilmanic district of the city of Los Angeles, has applied to this court for a writ of mandate to require of the respondent Dominguez, city clerk of the city of Los Angeles, that he omit the name of Robert S. MacAlister (hereinafter called defendant) from the roll of candidates on the sample ballots and official ballots of the city of Los Angeles to be used at the forthcoming primary election on the 2d day of April, 1935, of candidates for member of the council to be chosen at that election.

Although it is admitted that said defendant is duly qualified in all respects except in one particular, nevertheless, petitioner contends that defendant has not been a resident of the Eleventh councilmanic district for the full period of two years next preceding the date of said primary election (as required by the city charter, § 307), and that for this reason he is not entitled to have his name placed on the ballot.

The cause is now submitted to the court upon a stipulation of facts. From that stipulation it must be conceded that defendant has been a resident within the Eleventh councilmanic district at all times since the month of October, 1928, unless upon the particular facts stated it should be determined that he ceased to be a resident of said district, and was not resident therein from the 3d day of March, 1934, until on or about the 17th day of May following.

Without entering into an extended recital of the facts, it is sufficient to say that the removal of MacAlister from his home on Hayworth avenue in the Eleventh district appears to have been forced upon him by foreclosure proceedings; that his occupancy of a house

on Stearns avenue outside the borders of said district was merely a temporary result of said foreclosure proceedings; that he never intended to change his residence to any place outside the Eleventh councilmanic district; and that he promptly made arrangements to return and did return to actual residence within that district, as at all times he intended to do.

From the admitted facts, we conclude that the said MacAlister possesses the residence qualifications required by the city charter, and that the petition for writ of mandate should be denied.

It is so ordered.



4 Cal.App.2d 541

DIBIRT v. BOPP.

Civ. 775.

District Court of Appeal, Fourth District,
California.

Feb. 13, 1935.

1. Adverse possession ⇨89

In action to recover possession of strip of land 3 feet wide on defendant's side of fence, defense of adverse possession could not prevail where plaintiff since acquiring lots involved had paid all taxes assessed against them and official map on file showed the width of such lots.

2. Boundaries ⇨48(1)

Settlement of boundary dispute and erection of fence on line agreed upon by parties and acquiescence in line so fixed bind both parties, but mere acquiescence in existence of fence in absence of agreement that fence shall be true boundary is insufficient to establish claim of title to disputed strip of ground.

3. Boundaries ⇨48(7)

Where, in absence of controversy, fence was built and renewed under erroneous impression that it was on true line, acquiescence in assumed line did not estop owner who had paid taxes on lots described in official map from claiming all property up to true boundary line, notwithstanding defendant's cultivation of land on her side of fence.

Action by August Dibirt, also known as August Deibirt, against Elizabeth Bopp. From a judgment for plaintiff, defendant appeals.

Affirmed.

Lindsay & Gearhart, of Fresno, for appellant.

Ernest Klette, of Fresno, for respondent.

BARNARD, Presiding Justice.

A certain block in Fresno is divided into twenty lots running from lot 1 at the north to lot 20 at the south. According to the official map on file, each of these lots is 30 feet wide except lot 20, which is 33 feet. In 1891 Conrad Bopp bought lots 19 and 20, August Bopp bought lots 17 and 18, and a Mr. Huber bought lots 15 and 16. At that time these lots were vacant, but the more northerly lots in the block were occupied, with fences between the holdings, and there was a fence near the southerly side of lot 14. There was only 180 feet between this fence and the street to the south of this block, and, early in 1892, these three parties erected houses on their respective lots and built fences, each taking 60 feet of ground. The defendant, who is the widow of August Bopp, has resided on lots 17 and 18 since that time. The plaintiff purchased lots 19 and 20 from Conrad Bopp in 1902, receiving a deed, and since that time he has resided thereon.

Shortly before this suit was filed the plaintiff discovered that his deed called for 63 feet and brought this action to recover possession of a strip 3 feet wide which was then and for many years had been north of the fence which stood between his home and the home of the defendant. In her answer, the defendant set up as one defense that she had for more than five years held this strip adversely to the plaintiff and as another defense that for more than twenty-five years she and her husband, now deceased, had held the three-foot strip within an enclosure and had cultivated the same with the knowledge and consent of the plaintiff. The plaintiff recovered judgment, from which the defendant has appealed.

[1, 2] It appears from the evidence that the respondent paid all taxes assessed against lots 19 and 20 for each year from 1902 to the time of trial, and the defense of adverse possession could not prevail. *Stanford v. Trombly*, 181 Cal. 372, 186 P. 599; *In re Dixon*, 120 Cal. App. 635, 8 P.(2d) 881. The appellant contends, however, that it conclusively ap-

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

pears from the evidence that a dispute had arisen between these parties as to the location of their boundary line, that they settled the matter by agreeing on a certain boundary and erected a fence in accordance with such agreement, and that thereafter and for many years they acquiesced in the line so fixed. The general rule relied on by appellant is well established. *Silva v. Azevedo*, 178 Cal. 495, 173 P. 929; *Grants Pass Land & Water Co. v. Brown*, 168 Cal. 456, 143 P. 754; *Price v. De Reyes*, 161 Cal. 484, 119 P. 893. It is also well settled that a mere acquiescence in the existence of a fence in the absence of any agreement that the same shall be taken as the true boundary is not sufficient to establish a claim of title to a disputed strip of ground. *Phelan v. Drescher*, 92 Cal. App. 393, 268 P. 465; *Ross v. Burkhard Investment Co.*, 90 Cal. App. 201, 265 P. 982.

[3] Conrad Bopp, the respondent's predecessor in interest, testified that at the time the fence was built between his property and that now owned by the appellant the parties understood that each lot contained 30 feet; that he was then under the impression that he had 60 feet; that three or four years later some one told him the corner lot should include 33 feet; and that: "I went to my neighbors and speak with them so I could get an understanding how that is. They said all these lots only measured 30 feet and we don't know how you should have more. So, we let it go." He further testified that he talked with August Bopp and with his other neighbors and none of them knew anything about an extra 3 feet; that they did not "know any better"; that they were satisfied to let the fences stay where they were; and that when he sold the property to the respondent nothing was said about the dividing line. The respondent testified that nothing was said about the dividing line when he bought his property; that there was then a fence between the two places; that this fence has been replaced a time or two, but on the same location; and that he first discovered the existence of any question about the line a few months before this action was brought, when, in investigating why his taxes were too high, he learned that his deed called for 63 feet of ground. The appellant testified that shortly after she and her husband moved upon the property now owned by her they built a fence; that the fence has been rebuilt a time or two, but is in the same position; and that she never knew there

was any question about the line until shortly before this suit was filed. We think this evidence sustains the implied finding of the court that there was no such establishment of a line, and agreement that the same should be accepted as the true boundary, as is required under the rules of law referred to. The fence was originally built under the impression that each of the parties had 60 feet and not in accordance with any settlement of a dispute as to where the line was. While some one subsequently said that the corner lot should have an additional 3 feet, this was not confirmed by such inquiries as were made among the neighbors and nothing was done. Nothing appears but a mere acquiescence in the existence of the fence, and the evidence fails to show a definite agreement to accept the location of the fence as the true boundary line.

Some contention is made on the part of the appellant that the respondent is estopped from claiming the additional land because he knew that the appellant had raised flowers on her side of the fence for many years. There can be no such estoppel unless an agreement to accept a certain line as the true boundary, in settlement of a dispute with reference thereto, is disclosed by the evidence.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



4 Cal.App.2d 450

BAKURJIAN v. PUGH.

Civ. 8836.

District Court of Appeal, Second District,
Division 1, California.

Feb. 8, 1935.

1. Appeal and error ⇨854(6)

Order granting motion for new trial will be sustained if sustainable on any ground stated in notice of motion, whether argued or not, unless appellate court is prevented from considering such ground.

2. Appeal and error ⇨281(1)

Irregularity of proceedings as ground of motion for new trial could not be considered on appeal from order granting motion, where no supporting affidavits were filed (Code Civ. Proc. § 658).

3. New trial ☞75(1)

Statute making excessive damages ground for new trial is inapplicable in case of inadequate damages (Code Civ. Proc. § 657, subd. 5).

4. Appeal and error ☞933(4)

Insufficiency of evidence as ground of motion for new trial could not be considered on appeal, where minute order did not specify such insufficiency as ground on which motion was granted (Code Civ. Proc. § 657, last paragraph).

5. New trial ☞70

Motion for new trial because of insufficiency of evidence is addressed to trial court's sound discretion.

6. Appeal and error ☞979(1)

Ruling on motion for new trial on ground of insufficiency of evidence will not be disturbed on appeal except for clear abuse of discretion.

7. New trial ☞75(1)

Inadequate damages justify new trial.

8. New trial ☞75(1)

Order granting new trial because of inadequate damages must be based on ground of insufficiency of evidence, since review of evidence by trial court to determine liability in any amount is prerequisite to decision on question of adequacy of damages.

9. Appeal and error ☞241

Inadequacy of damages as reason for granting motion for new trial *held* not reviewable on appeal from order granting motion based on ground that verdict was against law.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Alice Bakurjian, a minor, by her guardian, Krikor Bakurjian, against W. B. Pugh. Verdict and judgment for plaintiff, who, being dissatisfied with the amount of damages, made a motion for a new trial. From an order granting the motion, defendant appeals.

Reversed.

George P. Kinkle and John S. Hunt, both of Los Angeles, for appellant.

Derthick, Cusack & Ganahl, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Plaintiff and respondent received injuries in an automobile accident, consisting of a sprain of the left shoulder, a laceration of

the left upper lip, laceration of the palmar surface of the right little finger, a laceration of the left forearm, a laceration of the right forearm, swelling and discoloration of the left knee and left eye. Some of the testimony indicated that the scars from the lacerations are permanent and that at the time of the trial there was still some disability in the injured finger. A jury awarded her a verdict of \$500. Judgment having been entered on the verdict, she made a motion for a new trial on the following grounds:

1. Irregularity of the proceedings which prevented a fair trial.
2. The jury in awarding damages were under the influence of passion and prejudice.
3. The evidence is insufficient to justify the verdict.
4. The verdict is against the law.
5. Errors of law occurring at the trial.

Upon hearing the motion the court, eliminating the unimportant recitals, caused the following order to be entered in the minutes: " * * * Said motion is by the court granted."

[1] Appellant—defendant in the trial court—appeals from the order. No affidavits were filed in support of the motion. Appellant asserts, and it is not denied by respondent, that the only point raised upon argument of the motion was that the damages awarded were grossly inadequate. The record, other than the ground stated in the notice of intention, discloses nothing in this regard, but even if the assertion of appellant is true, it is settled law that the order would be sustained if it could be sustained on any of the grounds set forth in the notice of motion, unless for some reason such ground cannot be considered.

[2] The first ground urged cannot be considered because there are no affidavits in support of it. Code Civ. Proc. § 658.

[3] The second ground cannot be considered, because it has been held that subdivision 5, § 657, Code of Civil Procedure, which provides as one of the grounds for new trial "excessive damages, appearing to have been given under the influence of passion or prejudice," does not apply to a situation in which inadequate damages may have been given. In *Benjamin v. Stewart*, 61 Cal. 605, at page 608, the court says: "Section 657 provides that a new trial may be granted for the cause of 'excessive damages, appearing to have been given under the influence of passion or prejudice.' But there is no provision which au-

thorizes the setting aside of a finding because of the 'passion or prejudice' of a jury, exhibited by the rendition of a verdict for insufficient damages; and as the whole matter is statutory, the last is not proper as an independent ground for setting aside a verdict." To this same effect, see *Lambert v. Kamp*, 101 Cal. App. 388, 281 P. 690.

[4] The third ground cannot be considered because the minute order granting the motion does not specify it as one of the grounds upon which the motion was granted. Code Civ. Proc., last paragraph of section 657. The order then, if it is to be sustained, will have to be sustained upon either or both of grounds four and five.

[5, 6] The authorities submitted by respondent reiterate the thoroughly established doctrine that: "It is the rule that a motion for a new trial upon the ground of the insufficiency of the evidence to sustain the verdict and judgment is addressed to the sound discretion of the trial court and that its order will not be disturbed on appeal except in a clear case of the abuse of such discretion." *Zurich Ins. Co. v. Home Tel., etc., Co.*, 119 Cal. App. 65, 5 P.(2d) 943. We are not concerned with this rule, because, as already pointed out, insufficiency of the evidence to sustain the verdict and judgment cannot be considered, since the order was not made upon that ground.

In order to determine whether any errors of law occurred at the trial, a complete examination of the entire record has been made. The reporter's transcript contains none of the instructions given to the jury, and none are called to our attention. Neither is there a claim on either side that any given were erroneous, nor that any refused were improperly refused. The record discloses rulings on questions of evidence resulting from objections and motions on both sides. These objections and motions were for the most part on matters of conclusions, argument, leading questions, and hearsay. They are all substantially correct. If any latitude in these rulings was granted by the court, such latitude was in respondent's favor. In short, we find nothing in the record and exactly nothing in the record has been called to our attention to justify the order on the fifth ground.

Since the only reason indicated for the action of the court is that the damages were grossly inadequate, the sole remaining question is: Can the alleged inadequacy of the damages be urged or reviewed on the only remaining ground which was listed in the no-

tice of intention to move for a new trial, to wit, that the verdict is against the law?

[7-9] It is settled that inadequacy of damages is sufficient cause for granting a new trial (*Phillips v. Lyon*, 109 Cal. App. 264, 268, 292 P. 711); but it seems to be just as thoroughly settled that if granted for that reason, the order granting same must be placed upon the ground of the insufficiency of the evidence, and it is trite law that when a motion for a new trial is granted for that reason, the order must say so. In *Phillips v. Lyon*, supra, at page 268 of 109 Cal. App., 292 P. 711, 712, the court says: "While a court may not set aside a verdict and grant a new trial merely because the judge does not agree with the amount of the award of damages, where it is so grossly inadequate or excessive as to leave no reasonable doubt that the verdict is the result of passion or prejudice or that it is contrary to the evidence and constitutes a clear abuse of the discretion of the jury, a new trial should be granted for the reason that the award of damages is not justified by the evidence. * * *

In *Lambert v. Kamp*, supra, pages 390, 391 of 101 Cal. App., 281 P. 690, the court says: "On the other hand, it is well settled that an inadequate recovery may be set aside and a new trial granted on the ground that the evidence does not justify the verdict." The soundness of this rule is demonstrated by the fact that the inherent character of a complaint that damages are grossly inadequate requires a complete review by the trial court of the evidence, not only with reference to the issue of damages, but with reference also to the liability of the respective parties. Thus in the *Lambert Case*, supra, at page 392 of 101 Cal. App., 281 P. 690, 691, the court says: "Appellant's right to recover anything at all from respondents depended primarily upon his being able to prove by a preponderance of the evidence that respondent * * * was guilty of some negligent act or omission. * * * The amount of damages resulting from the injury is a secondary matter and need not be considered at all unless negligence be proven. Therefore, in considering the merits of a motion for a new trial based upon insufficiency of the evidence, in order to determine whether or not the moving party has just cause to complain of having received too little at the hands of a jury, the trial court should first determine from an examination of the evidence whether the complaining party was entitled to recover anything at all."

Since a review of the evidence to determine liability in the first instance is a condition precedent to a decision on the question of adequate damages, it is logical that the sufficiency of the evidence to support the verdict is and should be the ground urged to reach a complaint that damages are grossly inadequate. The order, however, does not, as it must under the law, specify insufficiency of the evidence as one of the grounds upon which it was granted.

The order is reversed.

We concur: CONREY, P. J.; YORK, J.



4 Cal.App.2d 353

**GROSS v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.**
Civ. 8858.

District Court of Appeal, Second District,
Division 1, California.
Feb. 2, 1935.

1. Vendor and purchaser ⇨351(8)

Loss of profits from prospective sale of realty because of delay in conveying it to prospective seller is not allowable measure of damages for breach of contract to convey it (Civ. Code, § 3306).

2. Vendor and purchaser ⇨349

Complaint in action for breach of contract to convey realty *held* insufficient, in absence of allegation of defendant's bad faith or facts warranting inference thereof; allegation that defendant failed and refused to furnish deed and guaranty being insufficient.

3. Pleading ⇨403(3)

Complaint not alleging defendant's bad faith or facts warranting inference thereof in action for breach of contract to convey realty *held* not rendered sufficient as against defendant's motion for judgment on pleadings by allegation in answer that defendant acted in good faith and furnished deed and guaranty as soon as possible.

4. Pleading ⇨350(1)

Defendant's motion for judgment on pleadings tests sufficiency of complaint.

5. Vendor and purchaser ⇨349

Complaint, predicated right to recover damages for breach of contract to convey realty solely on alleged loss of profits from

prospective resale thereof, rather than difference between price paid and value of property, and not alleging such value, *held* insufficient; value of property not being inferable from alleged fact that plaintiff had opportunity to resell it at advanced figure.

6. Pleading ⇨350(3), 428(6)

Plaintiff, electing to stand on complaint without seeking leave to amend it after objection to introduction of evidence thereunder and motion by defendant for judgment on pleadings, submitted to court question of plaintiff's right to recover judgment on proof of all facts alleged in complaint.

Appeal from Superior Court, Los Angeles County; Frank Lamberson, Judge.

Action by Alex. B. Gross against the Bank of America National Trust & Savings Association. Judgment for defendant, and plaintiff appeals.

Affirmed.

Evans, Pearce & Campbell and Wilbur Bassett, all of Los Angeles, for appellant.

Edmund Nelson, Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff sues for damages for breach of a contract to convey real property. Sufficient allegations are found in the complaint of the making of the contract, the payment of the purchase money to defendant, and the delay of the defendant for more than one year thereafter to furnish the deed and evidence of the title contracted for. It appears from the complaint that the unpaid balance of the purchase price was agreed to be \$1,165.50, which sum was paid to defendant August 7, 1928, at which time plaintiff was assured that a deed and guaranty of title would be forthcoming. It is then alleged that plaintiff had an opportunity to sell the property at a profit of \$5,925; that he informed defendant of that fact and entered into an agreement of sale; that defendant "failed and refused" to make the conveyance until on or about August 17, 1929; and that because of the delay plaintiff lost the opportunity to sell the property and has been damaged in the sum of \$5,925, the profits he would have made on the sale.

At the commencement of the trial objection was made to the introduction of evidence upon the ground that the complaint failed to state a cause of action and a motion was made by defendant for judgment on the pleadings.

The objection was sustained, the motion granted, and from the judgment entered plaintiff prosecutes this appeal.

[1] The rulings of the court were correct. Under the provisions of section 3306, Civil Code, damages in such a case are limited to the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, adding thereto in case of bad faith the excess of the value over the price to be paid and the expenses properly incurred in preparing to enter upon the land.

It appears from the complaint that the entire damage alleged to have been sustained consisted of the claimed loss of profits. This is not an allowable measure of recovery in a case of this nature.

[2] No bad faith on the part of the defendant was alleged, nor was there allegation of facts from which bad faith could be inferred. It is true that a refusal to convey property pursuant to contract obligations, where such refusal is unexcused or willful, is sufficient to show bad faith; but in the complaint in question no such facts were alleged. It was not alleged that defendant was able to furnish the deed and evidence of title or that it was unwilling to do so, nor was anything alleged to show that its failure was not attributable to causes entirely beyond its control. The allegation that defendant "failed and refused" to furnish the deed and guaranty is entirely insufficient.

The case is ruled in its essential features by *Coger v. Wiltsey*, 117 Cal. App. 652, 4 P. (2d) 302, and cases therein cited.

When the deficiencies of the complaint were pointed out on the motion for judgment on the pleadings, plaintiff did not seek leave to amend. It therefore fairly appears that the complaint stated the case as favorably to plaintiff as was possible.

[3-6] Appellant seeks to rely upon certain of the allegations of defendant's answer to the effect that defendant at all times acted in the utmost good faith and furnished the deed and guaranty as soon as possible under the circumstances. This allegation appellant says is deemed to be denied, and it is urged in support of the sufficiency of the complaint that the question of good faith was thereby put in issue and that this particular defect in the complaint was therefore remedied and the complaint made sufficient as against a motion for judgment on the pleadings. The argument is unconvincing and is opposed to the rule that a motion by a defendant for judgment

on the pleadings tests the sufficiency of the complaint. *Heinsbergen v. Jenking*, 113 Cal. App. 394, 298 P. 104. In any event, the complaint was insufficient, as the right to recover was predicated solely upon the alleged loss of profits and not upon the difference between the price paid and the value of the property. The complaint contained no allegation as to value and the value cannot be inferred from the alleged fact that plaintiff had an opportunity to resell the property at an advanced figure. Plaintiff, having elected to stand on the complaint without seeking leave to amend, submitted to the court the question whether he would be entitled to recover judgment upon proof of all the facts alleged in the complaint.

The court ruled correctly in favor of the defendant, and the judgment is therefore affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



4 Cal.App.2d 265

Ex parte CRANE.
Cr. 2659.

District Court of Appeal, Second District,
Division 2, California.

Jan. 30, 1935.

Criminal law — 1206(5)

Statute prohibiting confinement in county jail in excess of one year held not to entitle one sentenced to more than one year in county jail for crimes committed prior to effective date of statute to be released on ground that statute was an implied repeal of statutes providing for confinement beyond period of one year in county jail and that such repeal was effective for crimes already committed (Pen. Code, § 15; § 19a, as added by St. 1933, p. 2217; Pol. Code, § 329).

Penal Code, § 19a, as added by St. 1933, p. 2217, prohibiting confinement in county jail in excess of one year did not entitle one sentenced to more than one year in county jail for crimes committed prior to effective date of section 19a to be released on ground that section 19a was an implied repeal of statutes providing for confinement for period beyond one year in county jail and that such repeal was effective for crimes already committed as against contention that Political

Code, § 329, providing that repeal of law creating a criminal offense does not constitute a bar to prosecution and punishment of an act already committed unless intention to bar such prosecution and punishment was expressly declared in the repealing act was inapplicable on ground that section 329 refers to the repeal of any law creating a criminal offense and that unless a definition in the law creating the crime was repealed, there was no repeal, since in view of definition of crime or public offense in Penal Code, § 15, designation of punishment is as necessary to create a criminal offense as a definition of the crime.

Application of Gerald Crane for a writ of habeas corpus. From an order discharging petitioner from imprisonment, the People appeal.

Reversed, and petitioner remanded to the sheriff of Los Angeles county.

U. S. Webb, Atty. Gen., Paul D. McCormick, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

Gladys Towles Root, of Los Angeles, for respondent Gerald Crane.

CRAIL, Justice.

This is an appeal by the people under the provisions of section 1506, Penal Code, from an order of the superior court on habeas corpus discharging petitioner Crane from imprisonment upon the ground that he was entitled to such an order under section 19a of the Penal Code, effective August 22, 1933, as added by St. 1933, p. 2217, which provides that "in no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year." The petitioner Crane was convicted of the crime of burglary. The court pronounced judgment and sentence and entered the same in the judgment book and thereafter made the following order: "Execution of sentence is suspended and defendant granted probation for a period of five years under the following conditions," etc. In a different case and on a subsequent date Crane was found guilty of the crime of burglary and in this case the defendant was sentenced to one year in the county jail and the sentence was ordered to run consecutively with the sentence in the first case. On November 13, 1934, on the pe-

tition of said Crane, a writ of habeas corpus was issued by the superior court which came on for hearing on November 15, 1934, and, after the sheriff had made his return setting forth the facts as above stated, the court made an order releasing the defendant on the ground that he was being illegally confined under the terms of said section. From this order, the people appeal.

Both crimes were committed prior to the effective date of said section 19a and it is the contention of the appellant that for this reason section 19a has no reference to the sentences under which the petitioner Crane was being confined. It is the contention of petitioner Crane, however, that the enactment of section 19a was an implied repeal of statutes which provided for the punishment of crimes by imprisonment in the county jail in so far as they provided for confinement therein beyond the period of one year and that this repeal is as effective for crimes already committed as for crimes thereafter to be committed. This might be true if it were not for the general saving clause contained in section 329 of our Political Code, which is as follows: "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act." But it is contended that this section refers to the repeal of any law creating a criminal offense; that the description or definition of acts necessary to constitute a crime is necessary to create a crime; and that unless the definition in the law creating a crime is repealed, there is no repeal of such law within the meaning of said section. This is not our understanding. A crime or public offense is defined as "an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments," etc. Section 15, Pen. Code; *People v. McNulty*, 93 Cal. 427, 26 P. 597, 29 P. 61; *People v. Davis*, 67 Cal. App. 210, 227 P. 494. It logically follows that the designation of punishment is as necessary to create a criminal offense as a definition, and it is our conclusion therefore that section 329, Political Code, is applicable.

The order releasing the defendant on habeas corpus is reversed and he is remanded to the sheriff of Los Angeles county.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

4 Cal.App.2d 263

Ex parte RASMUSSEN.
Cr. 2648.

District Court of Appeal, Second District,
Division 2, California.

Jan. 30, 1935.

Criminal law ⇐1218

One sentenced to pay fine of \$2,500 or in default thereof to serve 500 days in county jail for violation of automobile code *held* entitled to discharge after one year's service, since statute providing that in no case shall any person sentenced to county jail for misdemeanor or as a condition of probation or for any reason be committed for more than a year, included sentences to jail for felonies (St. 1931, p. 2133, § 146; Pen. Code, § 19a, as added by St. 1933, p. 2217, § 2, and § 1203).

Application by Walter Rasmussen for a writ of habeas corpus.

Petitioner discharged from custody.

Gladys Towles Root, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CRAIL, Justice.

The petitioner was sentenced to pay a fine of \$2,500 or in default thereof to serve 500 days in the county jail for a violation of section 146 of the California Vehicle Act (St. 1923, p. 564, § 146, as amended by St. 1931, p. 2133). Having been imprisoned in excess of one year, he seeks his release since he has been confined in excess of the maximum period provided by section 19a, Penal Code (as added by St. 1933, p. 2217, § 2). That section reads as follows: "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year," etc.

This case is not different from those already decided by this court in *People v. Phair*, 137 Cal. App. 612, 31 P.(2d) 421, and *Ex Parte Fisher* (Cal. App.) 36 P.(2d) 841, and on the authority of those cases the petitioner should be discharged from custody.

The respondent contends, however, that section 19a does not apply to felonies but only to misdemeanors. The plain language of the section covers all classes of cases. The words "or as a condition of probation, or for any

reason" include felonies as well as misdemeanors. In the case of *In re Fisher, supra*, Mr. Justice Stephens, P. J., in a concurring opinion said: "The Legislature, recognizing that long periods of imprisonment in county jails have been legally prescribed under the probation laws (Pen. Code, § 1203), effectively prohibited such future practice by limiting the imprisonment period." Section 1203, Penal Code, deals with the granting of probation for felonies. We adopt the sentence above quoted and interpret section 19a, Penal Code, to apply to felonies as well as misdemeanors.

Petitioner is ordered discharged from custody.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



4 Cal.App.2d 600

PEOPLE v. DAVIS.
Cr. 179.

District Court of Appeal, Fourth District,
California.

Feb. 15, 1935.

Larceny ⇐65

Evidence *held* to sustain conviction of petit theft.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Jack Davis was convicted of petit theft, and he appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was convicted of the crime of petit theft. He was charged with and admitted having suffered two prior convictions of petit theft and having served terms therefor in penal institutions.

He urges four grounds for a reversal of the judgment against him: (1) That the evidence is insufficient to support the judgment; (2) that the trial court erred in refusing his re-

quest for an instructed verdict; (3) errors in ruling on the admissibility of evidence; (4) errors in instructions to the jury.

The evidence amply supports the judgment. It may be summarized as follows: Safeway Store No. 2 is located on Main street in the city of Visalia. On the morning of August 7, 1934, defendant and a companion entered the store and one of them obtained a drink of water. Some time before noon on this same day the manager filled the shelves of a case near the front of the store with cartons of cigarettes. About 1 o'clock in the afternoon defendant was found with two cartons of Chesterfield cigarettes concealed beneath the bib of his overalls. The cartons bore the serial number E-21-4. Two cartons were missing from the case in Safeway Store No. 2. No cigarettes had been sold from the case after it was filled and before the arrest of defendant. All cartons of cigarettes in a package of fifty bear the same serial number. Cartons of Chesterfield cigarettes in the case bore the serial number E-21-4. Defendant and a companion had been at Safeway Store No. 2 about half an hour before the arrest. He told the chief of police of Visalia that he obtained the cigarettes at this store.

We have examined the record with the other specifications of error in mind and find no merit in any of them.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



4 Cal.App.2d 385

**STEWART v. INDEMNITY INS. CO. OF
NORTH AMERICA et al.**

Civ. 9266.

District Court of Appeal, First District,
Division 2, California.

Feb. 4, 1935.

Hearing Denied by Supreme Court
April 5, 1935.

1. Brokers ⇐4

Surety was liable on statutory bond of brokers who failed to deliver securities sold or to account to purchasers for payments received on purchase price, irrespective of brokers' fraud or whether they made contracts with no intention of fulfilling them (St. 1925, p. 967, § 5, subd. 3).

2. Fraud ⇐58(3)

Evidence of fraudulent conduct of party subsequent to making of contract will support an inference that he made contract with no intention of performing it.

3. Appeal and error ⇐918(3)

Denial of motion to amend complaint to conform to proof regarding claims not pleaded held not error, where proof was received subject to objection on condition that if leave to amend should not be granted all such proof would be deemed stricken out, and record showed that trial closed on December 6, 1929, that motion for leave to amend complaint was noticed for January 31, 1930, but not whether motion was made or presented, and order for judgment and denial of motion to amend on December 1, 1932, with judgment on findings entered on March 20, 1933.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by G. A. Stewart against the Indemnity Insurance Company of North America and another. From judgment rendered, plaintiff and the named defendant separately appeal.

Affirmed.

Hartley F. Peart, Gus L. Baraty, and Russel Shearer, all of San Francisco, for appellants.

C. Huntington Jacobs, Arthur P. Shapro, and A. L. Crawford, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

In an action upon two separate contracts for the sale of securities plaintiff had judgment against the brokers and the indemnity company as surety for the brokers upon a bond given under the Corporate Securities Act as amended by Statutes of 1925, p. 962. The indemnity company has appealed from the portion of the judgment adverse to that company, and the plaintiff has appealed from the portion of the judgment which denied recovery of funds paid to the brokers upon a separate account not pleaded in the complaint. By stipulation both appeals are presented upon the same record.

The trial court found that during the year 1926 the plaintiff's assignors paid to S. E. Whiting Company, licensed brokers, acting as brokers for a South San Francisco finance corporation, \$1,360 upon the sale of stock of the loan company; that the brokers failed to

deliver the stock or anything of value to the purchasers and refused to give any accounting of the moneys received. It was further found that when the brokers accepted these payments they had no intention of delivering the stock to the purchasers. Upon these findings the court gave judgment against the surety for the sums paid during 1926, the year of its bond.

The indemnity company states the only question involved in its appeal as follows: "Whether, in an action upon a broker's bond given under the Corporate Securities Act, a plaintiff should be allowed to recover moneys from the surety which had been paid to the broker principal on two contracts to purchase stock from the broker principal based entirely upon a finding of the court that the broker principal at the time of making the contracts had no intention of fulfilling his part of such contracts, where there is no evidence to support such a finding nor from which such an inference could be drawn?"

The question stated does not require comment because the judgment does not depend "entirely" upon the finding of the broker's intention and also because there is some evidence to support that finding.

The liability of the surety rests upon the provisions of section 5, subd. 3, of the Corporate Securities Act (Deering's Gen. Laws, Act No. 3814, as amended, Stats. 1925, p. 967) under which the bond was given. This section reads in part: "Said bond shall be conditioned upon the strict compliance with the provisions of this act, and the honest and faithful application of all funds received and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities, by said broker, his agents and employees. Said bond shall be further conditioned upon the payment of all damages suffered by any person damaged or defrauded by reason of the violation of any of the provisions of this act, or by reason of any fraud connected with or growing out of any transaction contemplated by the provisions of this act." The bond executed by the appellant contained similar language.

[1] It will be noted that it not only insured against fraud on the part of the broker, but that it undertakes that the broker will make an honest and faithful application of all funds received and a faithful and honest performance of all obligations and undertakings in the purchase and sale of securities. Thus the fraud of a broker is but one element of the surety's liability. If there is a failure in any of the other obligations

mentioned in the section, the surety is liable. Hence it was not necessary for respondent to prove fraud or to prove that the contracts were made by the brokers with no intention of fulfilling them. It was sufficient to prove, as the undisputed evidence does prove, that the brokers executed written contracts of sale (with some private oral arrangement with the purchasers as to future payments) of a certain number of shares, or units, of the capital stock of their principal, and that the brokers refused to deliver any of the stock to the purchasers or to account to them for the payments received. The only reasonable inference that can be drawn from the evidence is that the brokers appropriated these funds to their own use, and this brings their conduct strictly within the terms of the bond.

[2] This evidence, taken with the direct evidence of the fraudulent misrepresentations and deceit of the brokers subsequent to 1926, supports the inference drawn by the trial court in its finding that, at the time the contracts were made, the brokers did not intend to fulfill them. The authorities agree that evidence of subsequent conduct will support an inference covering the intent of a party at the time the contract is made. *Snyder v. City Bond & Finance Co.*, 106 Cal. App. 745, 748, 289 P. 859.

The appeal of the plaintiff and cross-appellant rests in these facts: The complaint pleaded two contracts with the brokers for the sale of stock to plaintiff's assignors in a South San Francisco finance company. The assignors of the plaintiff testified that they had made some payments to the brokers on other contracts during the year 1926, and the plaintiff asked leave to amend his complaint to conform to the proof so that he might recover these funds. A ruling on the request was postponed to the end of the trial, and all evidence relating to these payments not pleaded was received subject to the condition that if leave to amend was not granted all such evidence would be deemed stricken from the record. The trial was closed December 6, 1929, and a motion for leave to amend was noticed for January 31, 1930, but the record does not show that this motion was ever made or presented. The next entry in the record is of December 1, 1932, which shows an order for judgment for the plaintiff and an order denying plaintiff's motion for leave to amend. Judgment on the findings was entered March 20, 1933, but nothing is said therein regarding this motion, and the findings are silent as to these separate transactions.

[3] In this state of the record we must assume that the trial court denied the motion for some good reason; it may have been because the motion was not presented, or because of unreasonable delay, or because the testimony upon which the plaintiff relied was so inherently improbable that it was rejected. For whatever reason the order was made the record does not justify a review of it by this court.

The judgment is affirmed, each party to bear its own costs.

We concur: STURTEVANT, J.; SPENCE, J.



4 Cal.App.2d 426

RASMUSSEN v. SHICKLE.

Civ. 9287.

District Court of Appeal, Second District,
Division 2, California.

Feb. 7, 1935.

Hearing Denied by Supreme Court
April 8, 1935.

1. Evidence ⇨571(3)

Medical opinion held not to establish prima facie case of negligence by physician in treatment of oblique fractures of leg, authorizing nonsuit.

Evidence showed that some three weeks after bones had been set, physician massaged leg and manipulated foot and ankle, and that immediately thereafter patient experienced severe tearing sensation of pain in leg, of which she complained to physician; that no X-ray photographs were taken until six weeks later, when photographs revealed that fractured bones were not in place and were ununited; that operation was performed, bones scraped, reset with aid of bone grafting, and in due time healing of fractures and surgical wound was accomplished. Medical expert was asked whether it was proper practice in locality to allow patient to remain in bed for six weeks following massaging and complaint of pain of tearing apart without taking X-rays or using fluoroscope, to which expert answered that he did not know conditions, and could only say that such would not be proper practice if it was known that fracture had been disturbed, that patients with such type of fracture were in pain constantly, and that interpretation as to cause of pain must be left to doctor's judgment.

2. Physicians and surgeons ⇨18(8)

Proof of lack of proper care and skill in given treatment or failure to treat in certain way is not sufficient to establish malpractice by physician.

3. Physicians and surgeons ⇨14(2)

Physician need only have that degree of learning and skill ordinarily possessed by physicians of good standing practicing in his locality, and need only exercise reasonable and ordinary care and diligence in treating patient and in applying such learning and skill to case.

4. Physicians and surgeons ⇨18(6)

Exercise by physician of reasonable degree of care and skill will be presumed in absence of evidence to contrary, and absence of skill is not presumed from mere fact of failure of treatment to produce healing.

5. Evidence ⇨546

Question of expert witness' competency is for trial court to determine in exercise of sound discretion.

6. Evidence ⇨538, 574

Proof of negligence or lack of care or skill by physician in malpractice case consists only in opinions of physicians familiar with practice in locality, whose testimony is conclusive on subject as against that of lay witnesses.

7. Evidence ⇨538

To qualify as expert in malpractice case against physician, witness must show himself to possess learning and knowledge sufficient to qualify him to speak with authority on subject, and familiarity with treatment and degree of care and skill of other practitioners in locality sufficient to qualify him to say whether defendant's treatment was consistent with what other physicians in exercise of reasonable care might do under similar circumstances.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Violet Rasmussen, individually and as administratrix of the estate of L. Rasmussen, deceased, against Dr. Charles Shickle. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Stephen Monteleone, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

This is an appeal from a judgment of nonsuit in an action for malpractice against a physician. Appellant claims errors in granting motion for nonsuit and in sustaining objection to the competency of an expert witness to give his opinion of respondent's treatment of his patient.

Respondent was employed by appellant to reduce oblique fractures of both bones of the leg and to treat the case until healing was accomplished. It is alleged and shown by evidence that some three weeks after the bones had been set respondent massaged the leg and manipulated the foot and ankle, and that immediately thereafter appellant experienced a severe tearing sensation of pain in the leg, of which she complained to respondent. No X-ray photographs were taken of the fractured bones after such complaint until six weeks later, when such photographs were taken and revealed that the fractured bones were not in place and were ununited. An operation was performed, the bones scraped, reset with the aid of bone grafting, and in due time the healing of the fractures and surgical wound was accomplished.

Appellant based her claim of malpractice on (1) respondent's causing the broken bones to slip from their position as a result of the massaging and manipulation, and (2) his failure to have X-ray photographs taken or to use ordinary care and skill in determining the fact that the fractured bones were not in proper position.

[1] Exclusive of the opinion of an expert witness, Dr. Ellis Jones, called by appellant, there is in the record of the evidence no proof of negligence on the part of respondent upon which the charge of malpractice may be predicated. Appellant contends that the opinion of Dr. Jones was sufficient to establish a prima facie case so as to render the motion for nonsuit ungrounded, under the familiar rules governing trial courts in considering and determining such motions. Reduced to its essentials for the purpose of its consideration herein in connection with the answer thereto, the question propounded to the expert is as follows: "Is it proper practice in this locality to allow the patient to remain in bed for a period of six weeks following that date [of massaging and complaint of pain of tearing apart] without taking X-rays or using a fluoroscope to determine the condition of the break at that time?" To which the following answer was given: "Well, I can only say that I don't know the conditions, all the conditions, in that situation. I can only

say that that would not be proper practice if it was known that the fracture had been disturbed. Patients with this type of fracture are in pain constantly. The interpretation as to what caused the pain must be left to the judgment of the doctor."

[2-4] The opinion thus expressed, viewed as evidence relevant to the question of malpractice, may not be considered of more weight or probative value than that to which it is entitled under the law controlling in malpractice cases. Aside from the inherent weakness manifest in the answer to establish negligence, proof of lack of proper care and skill in a given treatment or failure to treat in a certain way is not sufficient to establish a case of malpractice on the part of a physician. The law does not require that the advice, instructions, and treatment given by a physician to a patient shall be at all events *proper*, or that his treatment should be such as to attain an approximate perfect result. It requires only, first, that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in that locality; and, second, that he shall exercise reasonable and ordinary care and diligence in treating the patient and in applying such learning and skill to the case. *Proper* treatment implies that no error shall be committed thereby, that an approximate perfect result will be produced, that such result is guaranteed, whereas the law only demands that the physician use reasonable care to attain such approximate perfection. *Hesler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654; *Markart v. Zeimer*, 67 Cal. App. 363, 227 P. 683. In the absence of evidence to the contrary, the law will presume the exercise of a reasonable degree of care and skill, and absence of skill is not presumed from the mere fact of failure of the treatment to produce healing. If the physician possesses such reasonable degree of learning and skill, and in the treatment of the patient's injury exercised ordinary care and skill, measured by the standards of his profession in the same locality, he is not liable for results that followed. *Houghton v. Dickson*, 29 Cal. App. 321, 155 P. 128; *Callahan v. Hahne-mann Hospital* (Cal. Sup.) 35 P.(2d) 536. Measured by the foregoing rules, the evidence herein, taken in the view most favorable to appellant, including the above answer of the expert, wholly fails to establish a case of malpractice, and the motion for nonsuit was properly granted.

[5-7] Appellant offered a physician as an expert witness, and after a test of his qual-

ifications the court sustained an objection to his competency. The question of competency of an expert witness to give his opinion in evidence is for the trial court to determine in the exercise of a sound discretion. It is the rule that proof of negligence for lack of care or skill on the part of a physician in a malpractice case consists only in the opinions of experts, that is, physicians familiar with the practice in the locality (*Hiraide v. Cochran*, 109 Cal. App. 377, 293 P. 165), whose testimony is conclusive on the subject as against that of lay witnesses (*Callahan v. Hahnnemann Hospital*, supra). To qualify as such expert in a malpractice case against a physician the witness must not only show himself to possess learning and knowledge of the subject of inquiry sufficient to qualify him to speak with authority on the subject, but also a familiarity with the treatment and degree of care and skill of other practitioners in the locality in question, sufficient to qualify him to say whether or not the defendant's treatment was consistent with what other physicians in the exercise of reasonable care might do under similar circumstances. The examination of qualifications of the offered expert failed to show that he possessed sufficient familiarity with the practice in respect to treatment of oblique fractures of leg bones in the locality in question. There was accordingly no abuse of discretion in sustaining the objection as to his competency.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 488

WOODWORTH v. MORGAN et al. (two cases).

Civ. 8393, 8394.

District Court of Appeal, Second District,
Division 1, California.

Feb. 11, 1935.

Rehearing Denied March 12, 1935.

1. Appeal and error ⇨1071(6)

Failure of court to make finding upon allegation in answer, upon which there was direct evidence, that plaintiff driver was negligent in attempting to make turn in path of truck of defendant which was following plaintiff's automobile, held reversible error.

2. Appeal and error ⇨1122(2)

In action for injuries sustained in automobile collision, upon failure of trial court to make findings upon issue of plaintiffs' negligence, District Court of Appeal could not make findings of its own where there was direct conflict in evidence.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Separate actions, which were consolidated for trial, by Margaret I. Woodworth, and by Lucius E. Woodworth, against E. P. Morgan and others. Judgment for plaintiff in each action, and defendants appeal.

Reversed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Thomas B. Reed and Otho S. Vernon, both of Los Angeles, for respondents.

YORK, Justice.

Plaintiffs, who are husband and wife, brought two actions which were consolidated for trial, asking for damages for personal injuries sustained by them in a collision between their car and defendants' truck. From judgments in favor of plaintiffs, defendants prosecute this appeal.

[1] Among the various errors claimed by appellants is one which will require a reversal of the judgment. It is upon the point that the court failed to make a finding upon the allegation in the answer wherein it is specifically stated that the plaintiff "Margaret I. Woodworth so negligently, carelessly and unlawfully ran and operated said Chevrolet automobile that the same was caused to turn directly in the path of said truck being driven by defendant E. P. Morgan at a time when it was a hazardous act on the part of said Margaret I. Woodworth to attempt to make said turn and said Margaret I. Woodworth before making said turn did not first see that said movement could be made in safety, and said Margaret I. Woodworth did not wait until said movement could be made in safety and said movement affected the operation of the truck being driven by defendant E. P. Morgan and said Margaret I. Woodworth negligently and carelessly failed to give any signal of her intention to make said turn and said Margaret I. Woodworth negligently and carelessly drove said Chevrolet automobile into the path of said truck at a time when an ordinarily prudent person would not have

done so and as a proximate result of said negligence, carelessness and unlawful conduct on the part of said Margaret I. Woodworth, a collision occurred between said Chevrolet automobile and said truck and injury, if any, or damage, if any, sustained by said plaintiff were, and each thereof was, a proximate result of said negligence, carelessness and unlawful conduct on the part of said Margaret I. Woodworth."

The testimony of the driver of the defendants' truck was that Mrs. Woodworth signaled that she was going to make a stop and that was the sole reason for the collision, in that she did not make the stop for which she had signaled, but that she made a left-hand turn and the collision then occurred. Her testimony, which evidently was believed by the trial court, was that she signaled a left-hand turn more than fifty feet before starting to make the turn. However, under all the circumstances of the case, the findings of the court were not sufficient to support the judgment, in this, that the trial court failed to find that the accident was caused without any negligence on the part of the plaintiff Margaret I. Woodworth contributing thereto, and in failing to find specifically or even generally on the different allegations of negligence and carelessness set forth in defendants' answer; and also upon the separate affirmative defense by which it was alleged that the careless, negligent, and unlawful operation of the Chevrolet automobile was the proximate cause of the collision and the injury sustained.

This court is not deciding that the allegations of negligence contained in defendants' affirmative defense are in proper form to constitute a plea of contributory negligence. But the answer did set forth an allegation that the accident was proximately caused by specific alleged acts of the plaintiff Margaret I. Woodworth, and the only finding of the trial court in relation to this matter is that the defendant "E. P. Morgan so negligently and carelessly drove and operated the truck of the defendants * * * that said truck struck the automobile in which plaintiffs were riding with great force and violence." The only other finding of negligence is that "it is true that by reason of the said collision and the negligence of the defendants herein the plaintiff Margaret I. Woodworth was injured and bruised * * *"; and that "by reason of such collision Lucius E. Woodworth was injured and bruised" and suffered specific injuries.

[2] There was direct evidence as to whether or not the facts stated in the answer were true, and whether or not the facts set forth in the complaint were true. Plaintiffs would not be entitled to recover unless the facts stated in the answer as to the negligence of the plaintiff Margaret I. Woodworth were untrue. There is no general finding such as frequently is incorporated that might cover the point involved, and there is no finding as to the truth or falsity of such allegations of negligence. This court cannot appropriately make findings of fact of its own in a case of this kind, where there is a direct conflict in the evidence upon an issue which should have been and should be determined by the trial court.

The judgments are both reversed.

We concur: CONREY, P. J.; HOUSER, J.



4 Cal.App.2d 466

**FOSTER v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**
Civ. 10175.

District Court of Appeal, Second District,
Division 2, California.
Feb. 8, 1935.

1. Courts ⇐207(1)

District Court of Appeal should not entertain petition for writ affecting pending proceeding which is appealable directly to Supreme Court.

2. Courts ⇐207(5)

District Court of Appeal would not take jurisdiction of petition for writ of prohibition restraining judge from signing order changing adopted child's custody to foster father pending appeal in equitable proceeding between divorced foster parents for child's custody, which was appealable directly to Supreme Court (Const. art. 6, § 4).

Petition by Iva Gilbertson Foster for a writ of prohibition prayed to be directed to the Superior Court in and for Los Angeles County and the Honorable Lewis Howell Smith, Judge.

Writ withdrawn and dismissed and proceedings quashed.

Walter F. Haas, Stanley F. Maurseth, and G. E. Kerrin, all of Los Angeles, for petitioner.

Everett W. Mattoon, Fred M. Cross, Gurney E. Newlin, and Michael G. Luddy, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

Upon petition of Iva Gilbertson Foster, we issued the alternative writ of prohibition.

The facts out of which this proceeding arises are briefly as follows: Whitney Foster is the adopted son of John Morrell Foster and Iva Gilbertson Foster, who were husband and wife at the time of the adoption, but have since been divorced by the South Dakota courts. In the decree of divorce, the said son's custody was awarded to each of the parties, but at fixed and different times of the year. While in the custody of Mrs. Foster, the child was brought to California, and Mrs. Foster instituted proceedings in the California courts for the purpose of securing to herself the sole custody, care, and possession of the son. Mr. Foster resisted the claims and demands of Mrs. Foster in the proceedings, and himself, by cross-action asked for the sole custody of the son. At the conclusion of the trial of such proceeding, and after the judge presiding had indicated his conclusions in a written memorandum of opinion, which were favorable to Mr. Foster and unfavorable to Mrs. Foster, and prior to the signing of findings of fact and conclusions of law, and before the signing or entry of any judgment, attorneys for Mr. Foster presented a proposed order to the court. The effect of this order when signed would be to change the custody and possession of the said son from the foster mother to the foster father during the pendency of any appeal from the judgment in the case just tried, unless a higher California court should command differently. Petitioner alleges that such court will sign said proposed order unless prevented by this court.

In addition to filing an answer, the respondent court has demurred to the petition on the ground that the subject-matter was within the jurisdiction of the trial court and was subject to the discretion of such trial court, and that therefore this court cannot interfere with its writ of prohibition.

[1] It also demurs upon the ground that it is the fixed policy and practice of the reviewing courts of this state that the Supreme Court should not entertain a petition for a

writ affecting a pending proceeding which is appealable directly to the District Court of Appeal, and that the District Court of Appeal should observe the same rule where the appeal would be directly to the Supreme Court.

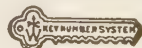
We think there is no escape from the latter contention. *Collins v. Superior Court*, 147 Cal. 264, 81 P. 509; *Gunder v. Superior Court*, 100 Cal. App. 334, 279 P. 822; *Los Feliz Investment Co. v. Superior Court* (Cal. App.) 35 P.(2d) 131.

[2] The proceeding in the trial court out of which this proceeding arose was equitable, and all equity cases must be appealed directly to the Supreme Court. The Court of Appeal can only gain jurisdiction of such cases or proceedings through the discretionary action of the Supreme Court. Article 6, § 4, Constitution of California.

It may be that this objection to our taking jurisdiction does not fall within the statutory demurrer, but, now that it has been called to our attention, we do not feel at liberty to ignore it.

The writ issued is withdrawn and dismissed, and the proceedings are quashed. *Fink v. Superior Court*, 105 Cal. App. 540, 288 P. 124.

We concur: CRAWL, J.; WILLIS, Justice pro tem.



4 Cal.App.2d 526

**FORD v. DEPARTMENT OF WATER AND
POWER OF CITY OF LOS
ANGELES et al.**
Civ. 10070.

District Court of Appeal, Second District,
Division 2, California.

Feb. 13, 1935.

Hearing Denied by Supreme Court
April 11, 1935.

I. Municipal corporations Ⓒ218(6)

Where, upon abolition of position, petitioner was entitled, under city charter, to "displace" employee in lower class group who had shorter length of service in such class and in classes of higher rank, civil service commission's action in creating new position in lower class, placing petitioner therein, and on same day suspending petitioner for "lack of work," while retaining the employee peti-

tioner was entitled to displace, *held* in violation of charter.

[Ed. Note.—For other definitions of "Displace," see Words & Phrases.]

2. Mandamus ☞141

District Court of Appeal *held* to have jurisdiction to grant mandamus compelling compliance with city charter which entitled petitioner to displace another employee in city's water and power department, and to compel payment of back salary to petitioner who had been wrongfully suspended.

3. Mandamus ☞143(2)

Petitioner wrongfully suspended from civil service position in water and power department of city *held* not guilty of laches which would preclude mandamus compelling compliance with charter, where petitioner, since his suspension, had been constantly protesting, filing demands, filing claims for salary, and litigating.

4. Municipal corporations ☞220(8)

Where city charter provided that all claims other than for damages should be presented within six months after last item of account or claim accrued, and petitioner, who was wrongfully suspended on September 11, 1933, filed first claim for salary within two months after suspension and another claim on June 12, 1934, petitioner *held* entitled to recover salary due him.

Proceeding in mandate by A. J. Ford against the Department of Water and Power of the City of Los Angeles and others.

Writ granted.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Loren A. Butts, of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., of Los Angeles (S. B. Robinson, of Los Angeles, of counsel), for respondents.

CRAIL, Justice.

This is a proceeding in mandate to compel the respondents to follow the provisions of section 125 of the city charter under which petitioner claims that he is entitled to displace one of the persons holding a position of junior civil engineer grade B of said department "who has a shorter length of service in such class-group and in classes of higher rank"; and further to compel the respondents to pay to petitioner the salary due him from the 12th day of September, 1933, until he is so placed on duty.

[1] The petitioner entered the classified service of the city as early as 1906, but he

separated himself therefrom for a short period, and is not entitled to credit on his seniority until the period commencing December 12, 1923, when he again entered the service of the department of water and power in the position of junior civil engineer grade B. From that time on he served continuously under the civil service system of the respondents, although he was promoted from time to time to positions in classes of higher rank. During his last three years, and until he was suspended, petitioner held and occupied the position of assistant right of way and land agent. On August 29, 1933, this position was abolished by resolution of the board, and the petitioner was suspended. Upon his protest, and within a few days thereafter, he was notified that under the provisions of section 125 of the charter he was entitled to displace a person in the class group of junior civil engineer grade B, as he had formerly held such a position, and there was at that time a person serving in that class group who had a shorter length of service therein and in classes of higher rank, and that he should report for duty on September 11, 1933. At the time he appeared for such duty there were two persons, to wit, H. G. Butterfield and W. K. Kierulff, serving in the class group of junior civil engineer grade B who had shorter lengths of service than petitioner in that class group and in classes of higher rank, and under the express provisions of the section the petitioner had a clear legal right to displace one or the other of them. Instead of displacing one of these employees, the commission increased the number by one and placed petitioner in the new position. Under this arrangement the petitioner's service in that particular office was shorter than that of the employees above named. This anomalous situation arose out of petitioner's promotions and his service in positions of higher grade. The civil service rules provide that in making suspensions the person who has had the least length of service in the particular office shall be the one who is first suspended. When petitioner appeared for duty, no work of any kind or character was assigned to him, and on the same day he was notified that he was suspended from the new position for "lack of work." It is the contention of the respondents that their treatment of the petitioner was regular and legal in all respects. We do not think so.

The section of the charter means exactly what it says—"shall be entitled to displace." In other words, to crowd out, to take the

place of (Webster's Dictionary). Petitioner was entitled to displace Butterfield—to take the place of Butterfield. If Butterfield were no longer in the position, but were suspended and looking for a position of lower grade, he would not now be in the way of the petitioner. Creating a new position and then filling the new position is not "displacing" within the meaning of the section. Increasing the number of employees in the class group from three to four, and on the same day reducing the number from four to three, is not a compliance with this section of the charter. Petitioner was ordered to report for duty on a certain day, and then was discharged on the same day on the pretext that he was being suspended because of "lack of work." But the employee whom he was entitled to displace was retained in continuous service, which fact created the so-called lack of work. Whom did the petitioner displace? He did not displace any one. The three employees who were already serving in the class group have been employed continuously since that time. Had the petitioner been given the rights to which he was entitled, he would have displaced one or the other of the employees above named, and he would have been employed continuously down to date, and the petitioner would have no cause for complaint.

Respondents contend at length with regard to their right to suspend the petitioner. The question here involved is not one of suspension but of displacement.

[2] Respondents next contend that this court does not have jurisdiction to grant the writ and that there is a lack of necessary parties. That question has been fully settled against the respondents. *Shannon v. City of Los Angeles*, 205 Cal. 366, 270 P. 682; *Livingstone v. MacGillivray* (Cal. Sup.) 36 P.(2d) 622.

[3, 4] Respondents next contend that the petitioner has been guilty of laches. The record shows that the petitioner since the date of his suspension has been constantly protesting, filing demands, filing claims for salary, and litigating. Respondents have been guilty of delay and neglect, but petitioner at all times has been diligent in asserting his rights. Respondents' next contention is that petitioner is not entitled to recover the salary due him for the reason that he did not file a claim for salary within six months after he was suspended. The first claim for salary was filed by petitioner within two months after he was suspended, and he filed another claim on June 12, 1934. Respondents seem to con-

tend that petitioner's claim for salary accrued on the day he was suspended. Petitioner had no money due him on that day. Section 376 of the city charter provides that all claims other than for damages "shall be presented within six months after the last item of the account or claim accrued." We find no merit in this contention.

A writ of mandate will therefore issue requiring the respondents to comply with the city charter as above indicated and to pay the petitioner his salary as a junior civil engineer grade B from September 12, 1933, to date.

I concur: STEPHENS, P. J.



4 Cal.App.2d 379

HARRIS v. HARRIS.

Civ. 1565.

District Court of Appeal, Fourth District,
California.

Feb. 4, 1935.

Divorce ⚭124

Evidence held to support finding that plaintiff, at time divorce action was commenced, was resident of county in which action was brought.

— ♦ —
Appeal from Superior Court, Orange County; James L. Allen, Judge.

Divorce action by Frances M. Harris against F. Harold Harris. From an interlocutory judgment for plaintiff and from an order denying a motion for a new trial, defendant appeals.

Appeal from the order dismissed, and judgment affirmed.

Rutan & Mize, of Santa Ana, for appellant.

A. P. Michael Narlian, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

Each of the parties to this action sought a divorce on the ground of extreme cruelty. The court found for the plaintiff, and the defendant has appealed from the interlocutory judgment, and from the order denying motion for new trial.

The only point raised is that a finding to the effect that the respondent was a resident of Orange county at the time the action was brought is without support in the evidence.

The parties lived at San Juan Capistrano for about eight years before the action was brought, but appellant contends the respondent had established a residence in San Diego county before the complaint was filed on April 21, 1932. It is argued that it conclusively appears from the evidence that the respondent left the home of the appellant on April 19, 1932, and went to the home of her mother in Oceanside in San Diego county with the intention of remaining there.

The appellant testified that the date of the separation and the date the respondent left his home was April 19, 1932, although he testified that when she packed and left she told him she had filed a suit for divorce. A neighbor of the parties in San Juan Capistrano testified that the respondent came to his home at 3 o'clock one morning and that she stayed there until she went to Oceanside. The respondent testified that she was living at her home in San Juan Capistrano at the time she filed the complaint in this action and that she went to Oceanside after the complaint herein was filed. This testimony sufficiently supports the finding and the well-known rule applies with respect to the conflicting evidence relied upon by the appellant.

If it be assumed that the appellant's interpretation of the law relating to the establishment of a residence is correct, the same is not controlling in the situation which appears under the court's finding.

The attempted appeal from the order is dismissed, and the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



4 Cal.App.2d 381

HEINFELT et al. v. ARTH.

Civ. 1532.

District Court of Appeal, Fourth District,
California.

Feb. 4, 1935.

1. Appeal and error ⇐527(2)

In action by copartnership for broker's commissions, statement by trial court, filed

ten days before findings of fact were filed, that facts would support judgment for copartnership, but that judgment must be for defendant since copartnership had failed to prove it was duly licensed as real estate broker, *held* not a finding of fact and not part of record so as to support entry of judgment for copartnership after appellate court had reversed trial court and held that individually licensed brokers doing business as partnership could maintain action for commissions.

2. Appeal and error ⇐1180(1)

Unqualified reversal of case on appeal has effect of remanding cause for new trial, and places parties to action in same position as if case had never been tried.

3. Appeal and error ⇐1071(2)

In action by copartnership for broker's commissions, trial court's grant of copartner's motion for entry of findings of fact, conclusion of law, and judgment, and denial of new trial to defendant after judgment for defendant had been reversed on appeal, *held* prejudicial error, where no further evidence was introduced in support of motion, parties had not stipulated that transcript of proceedings at former trial could be used in support of motion, and nearly two years had elapsed since court had heard evidence (Const. art. 6, § 4½).

4. Evidence ⇐413

In action by brokers for commissions, evidence that brokers failed to procure binding contract of sale of property *held* not inadmissible as varying terms of written contract (Code Civ. Proc. § 1856).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by P. A. Heinfelt and another, copartners doing business under the fictitious firm name and style of National Realty Company, against Fred Arth. From judgment in favor of plaintiffs, defendant appeals.

Reversed and remanded.

Burton E. Hales, of Redlands, for appellant.

Swing & Swing, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This action was brought to collect a real estate commission from the defendant. The action was tried in April, 1932, with further hearings in May and September of that year. The court's only finding was to the effect that the National Realty Company, a copartner-

ship, was not a licensed real estate broker at the time the alleged cause of action arose. A judgment for the defendant was entered which was reversed on appeal. *Heinfelt v. Arth*, 135 Cal. App. 445, 27 P.(2d) 420.

Thereafter, the plaintiffs gave notice that they would, on February 19, 1934, move the court to make and enter findings of fact and conclusions of law in accordance with the prayer of the complaint and would move for judgment in their favor upon the ground that "under the evidence and the conclusions and findings of this Court in said action and the decision of the District Court of Appeal of the State of California, in and for the Fourth Appellate District, made and entered in the above-entitled matter on the appeal thereof to said Court, plaintiffs are entitled to judgment as prayed for." On March 30, 1934, findings of fact and conclusions of law were filed, in which it was found that all of the allegations of the complaint are true and all of the denials set out in the answer are untrue. On the same day a judgment was entered in favor of the plaintiffs, reciting that the plaintiffs had moved the court that findings of fact be made and entered in their favor as prayed for in the complaint, that the court had made and entered findings of fact and conclusions of law, and that judgment had been ordered in favor of the plaintiffs. From this judgment, the defendant has appealed.

The appellant contends that the previous order of reversal entitled him to a new trial, and that the court erred in making findings and entering judgment without a further hearing on the issues. It would appear from the record that on the hearing of the motion for findings and judgment it was not stipulated that the transcript of the proceedings on the former trial be used and no other evidence was received.

[1] Prior to the first appeal, no facts had been found with the exception of the one concerning the license. The respondents argue that at the first trial the court had in effect found for them upon all issues with the exception of the matter of the license. This is based upon the fact that some 10 days before the filing of the findings on the first trial there was filed what purports to be a "Decision" by the trial judge in which it is stated: "The facts in this case would support a judgment for the plaintiff * * * but the plaintiff was unable to establish the fact that (it was) a duly licensed real estate broker. * * * For this reason judgment must go for the defendant. Defendant will prepare findings in

accordance herewith." This did not purport to be and was not a finding of fact, and it is well settled that such an opinion expressed by the trial judge is not a part of the record.

[2] In support of their contention that no further hearing was required the respondents cite a number of cases from other states and a few early cases from this state. The cases cited from this state are not in point and, whatever may be the rule elsewhere, it is thoroughly settled in this state that an unqualified reversal on appeal has the effect of remanding a cause for a new trial and places the parties in the same position as if the case had never been tried. *Sharp v. Miller*, 66 Cal. 98, 4 P. 1065; *Myers v. McDonald*, 68 Cal. 162, 8 P. 809; *Falkner v. Hendy*, 107 Cal. 49, 40 P. 21, 386; *In re Estate of Pusey*, 177 Cal. 367, 170 P. 846; *Stein v. Leeman*, 161 Cal. 502, 119 P. 663; *Davis v. Le Mesnager*, 155 Cal. 519, 101 P. 910; *Watterson v. Owens River Canal Co.*, 190 Cal. 88, 210 P. 625; *Central Sav. Bank of Oakland v. Lake*, 201 Cal. 438, 257 P. 521; *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970; *Monson v. Fischer*, 219 Cal. 290, 26 P.(2d) 6; *Rossi v. Caire*, 39 Cal. App. 776, 180 P. 58; *Riedy v. Bidwell*, 93 Cal. App. 202, 269 P. 682.

[3, 4] The respondents further contend that the error, if any, in depriving the appellant of a new trial is one of procedure, is not prejudicial, and cannot be held to have resulted in a miscarriage of justice under section 4½ of article 6 of the Constitution. We are unable to agree that this error was without prejudice. No evidence was introduced at the hearing on the motion which resulted in the judgment now appealed from. The appellant was entitled to amend his pleadings if so advised, we cannot assume that there would be no additional evidence, and nearly two years had expired since the court heard the evidence. Moreover, the point now under consideration calls for an inspection of the evidence, and a transcript of the proceedings at the first trial has been filed in connection with this appeal. Without holding that the same is properly a part of the record here, we may add that it appears therefrom that the court erred in excluding certain evidence material to the defense raised that no binding contract of sale, covering the property for the sale of which a commission is sought, had been procured by the respondent brokers. This evidence was excluded on the ground that the same tended to vary the terms of a written contract but that rule, which applies only between the parties to such a contract or their

successors in interest (Code Civ. Proc. § 1856), had no application here. We think the denial of a new trial to the appellant was not a mere technical error, but was one which substantially affected his rights.

The judgment is reversed, and the cause is remanded for a new trial.

We concur: MARKS, J.; JENNINGS, J.



4 Cal.App.2d 497

JOHNSON et al. v. GOKEY et al.
Civ. 8840.

District Court of Appeal, Second District,
Division 1, California.
Feb. 11, 1935.

Appeal and error ~~6~~1064(2)

In action for injuries received in automobile collision, where there was conflicting evidence that both parties entered intersection at unlawful speed, and evidence was sufficient to support verdict for either party, instruction that defendant was negligent as matter of law held prejudicial error (Gen. Laws 1931, Act 5128, § 113).

Appeal from Superior Court, Los Angeles County; Erwin W. Owen, Judge.

Action by Mary Johnson and another against Lucie Gokey and another. Judgment for plaintiffs, and defendants appeal.

Reversed.

Frankley & Spray and W. H. Abrams, all of Los Angeles, for appellants.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondents.

EDMONDS, Justice pro tem.

On appeal from a judgment entered after verdict of a jury in an action for personal injuries, the defendants present the sole question of the effect of an instruction erroneously given.

The automobile accident which caused plaintiffs' injuries occurred before the amendment made in 1931 to section 113 of the California Vehicle Act (Deering's Gen. Laws, 1931 Ed. Act 5128). The case was tried after the

effective date of the amendment. The jury was instructed that: "If you find that defendant Robert Gokey was driving the Studebaker automobile in excess of the speed limit as he entered the intersection, that is, in excess of 15 miles per hour, then I instruct you that said defendant Robert Gokey was guilty of negligence as a matter of law." Respondents concede that this instruction was erroneously given [Pilcher v. Tanner Motor Livery, 138 Cal. App. 558, 33 P.(2d) 53], but contend that no prejudicial error resulted therefrom.

The defendant having admitted entering the intersection at more than fifteen miles per hour, the jurors by this instruction were told that he was guilty of negligence as a matter of law. They were not given the opportunity to determine whether or not "the operation of such vehicle at such speed constituted negligence." Deering's Gen. Laws, Act 5128, § 113. This deprived the defendant of a substantial right and he has been prejudiced thereby unless the verdict rendered is the only one which the evidence will support. Bieser v. Davies, 119 Cal. App. 659, 7 P.(2d) 388. But if the evidence will support a verdict for the appellant and under a correct instruction there might have been a verdict in his favor, he is entitled to a new trial. Hamlin v. Pacific Electric R. Co., 150 Cal. 776, 89 P. 1109; Moss v. Stubbs, 111 Cal. App. 359, 295 P. 572, 296 P. 86.

The evidence on the issue of liability shows a state of facts on which the verdict of the jury might have been either for the plaintiffs or for the defendants. The accident occurred at an intersection. The automobile driven by the defendant Gokey was traveling west, approaching an intersection. The automobile driven by plaintiff Johnson was proceeding north toward the same intersection. The view of each driver was obstructed within the meaning of section 113 (b) of the California Vehicle Act, supra. The cars collided in the intersection.

A number of witnesses for the plaintiffs testified that the automobile of the defendants entered the intersection at a speed variously estimated at twenty-five miles per hour or more, while the automobile driven by the plaintiff Johnson was half way across the intersection proceeding at ten to fifteen miles per hour. On the other hand, one witness testified on behalf of the defendants that the cars approached the intersection at approximately the same time, the plaintiffs' automobile traveling at thirty to thirty-five miles per hour. Another testified that the defendants'

automobile entered the intersection first. Which driver had the right of way and whether or not either or both drivers were negligent were, therefore, questions for the jury to determine.

The jury was correctly instructed that the prescribed rate of speed at the intersection was fifteen miles per hour, and that if both vehicles entered it at the same time, the one approaching from the right had the right of way. But they were also told that if the defendant Gokey was driving in excess of fifteen miles per hour as he entered the intersection, he was guilty of negligence as a matter of law. Very correctly, no such instruction was given concerning the acts of the plaintiff Johnson. But under these circumstances the jury undoubtedly viewed the acts of the respective drivers by entirely different standards of care. This certainly prejudiced the rights of the defendants.

If the jury had been correctly instructed, there might have been a verdict in the defendants' favor as we view the evidence before us. We cannot act upon the assumption that this would have been unlikely. There is substantial evidence in the record which would support a finding either way and we cannot weigh and determine which side is the stronger.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.



4 Cal.App.2d 455

IRVING v. SUNSET MUT. LIFE INS. CO.
Civ. 8797.

District Court of Appeal, Second District,
Division 1, California.

Feb. 8, 1935.

1. Insurance ☞379(5)

Where insured in good faith makes truthful answers to questions in application, but answers, due to the fraud, mistake, or negligence of agent filling out application, are incorrectly transcribed, insurer is estopped to assert falsity of answers as defense to action on policy.

2. Insurance ☞379(1)

Soliciting agent's acts in writing insured's address incorrectly after telling appli-

cant, who already had signed application, that he would fill in name and address later held acts of insurer so as to bar forfeiture of policy for nonpayment of assessments where notice was sent to incorrect address and was never received by insured.

3. Insurance ☞379(5)

Insured's failure to give notice to insurer at its home office that address in application had been incorrectly written by insurance agent held not under policy to relieve insurer from liability where notice of assessment which was sent to incorrect address was never paid by insured, and insured had notified president of insurer at his home that address was wrong and president had agreed to correct error.

4. Insurance ☞375(2)

President of insurer has right to waive strict provisions of policy which required insured to give notice of change of address to insurer at its home office, and to accept notice of change of address at some other place.

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action by Mabel A. Irving against the Sunset Mutual Life Insurance Company. From judgment in favor of plaintiff, and from an order denying a motion for new trial and a motion to vacate judgment, defendant appeals.

Judgment and order denying motion to vacate judgment affirmed, and appeal from order denying new trial dismissed.

Carlos S. Hardy, of Los Angeles, for appellant.

Shunk & Moroney, of Wilmington, for respondent.

ROTH, Justice pro tem.

On January 6, 1930, George P. Irving by his wife, Mabel A. Irving, respondent herein, made application for a mutual beneficial insurance certificate in the sum of \$3,000, in which respondent was named as beneficiary. At that time the Irvings were and had been for approximately seven years prior thereto residing at 1226 Hyatt avenue, Wilmington, Cal. The application was taken by one Rose, admittedly a soliciting agent of appellant company, who had been calling for some time on respondent enlisting her co-operation to persuade her husband to take out a certificate of insurance. Rose wrote out the answers to the questions contained in the application. No inquiry was made of respond-

ent as to her address or that of the assured, and when Rose had completed filling in the application, respondent read and, as agent for her husband, signed the same, remarking that the questions calling for the name and address of her husband had been left unanswered. Rose responded he would fill these out later. Subsequently a certificate which made the application therefor a part thereof was issued in the name of respondent's husband setting forth the address, as above stated, except that Long Beach was substituted for Wilmington. This error remained unobserved by the insured until a notice of assessment was received, which originally had been addressed to Long Beach from which place it was forwarded to Wilmington, the correct address. The mistaken address was then called to Rose's attention, who said it was his inadvertence and that he would take it up with the president of the company and have the address corrected. At that time Rose said that as he resided in Long Beach, the same place where the president resided, it would be convenient for him to cause the error to be rectified, and that he had handled similar situations on other certificates in the same manner. He further stated that it was not necessary to have the change made on the certificate, it being important only that the change be made on the books of the company. The assessment called for by the notice erroneously addressed was paid.

The court found that Rose did see the president of the company, called the error to his attention, and was in turn assured by the president, who made a memo of the correct address, that the records of the company would be corrected. The correction, however, was never made. Thereafter a subsequent notice of assessment was mailed to the assured at the incorrect address. It was never received and never brought to the attention of the assured, and it was never paid. The assured died May 21, 1930. Respondent offered to furnish appellant company with proof of death, and appellant denied liability, claiming that the certificate had been forfeited. The pertinent provisions of the certificate are: "Failure on the part of the Member to pay said Semi-Annual Dues, and/or Assessments, within Fifteen days from the date of the mailing by the Secretary to the Member of a notice requesting payment of the amount specified in such notice shall forfeit all rights of said Member in the Company." And: "The Member hereby agrees to notify the Company at its Home Office in Los Angeles, California, of any change of Post Office address and it shall not be necessary

for said Company to do more than mail notice of Dues and Assessments, properly stamped, to the Member at his or her last known address."

Respondent brought action on the certificate, established the facts summarized, and was awarded judgment for the full amount thereof. From that judgment and an order denying a motion for a new trial and an order denying motion to vacate the judgment, appellant presents this appeal.

The basic contention of appellant upon which it denied liability, predicated its defense at the trial and which it now urges on appeal, is that statements and representations made in an application for an insurance policy, even though written by some one other than the applicant, are, when the application is signed by the applicant, warranties upon which the insurer relies. If they are untrue, then such misstatements and misrepresentations are fatal to the policy. *Whitney v. West Coast Life Ins. Co.*, 177 Cal. 74, 169 P. 997. 'This rule has been so interpreted, appellant contends, that it applies to those cases in which the insured has been guilty of no active misrepresentations or mistakes, the misrepresentations or mistakes having been in fact made by the soliciting agent, when upon the delivery of the policy to the insured such misrepresentations or mistakes are patent on its face, since under such circumstances it will be presumed that the insured read the certificate and by his silence approved the actions of the soliciting agent, thereby making the soliciting agent his agent as well as the agent of the company. *Goldstone v. Columbia Life, etc., Co.*, 33 Cal. App. 119, 164 P. 416. Upholding this principle, the court in *Layton v. New York Life Ins. Co.*, 55 Cal. App. 202, 206, 207, 202 P. 958, 960, says: "Where one holds a policy, referring in apt terms to the warranties and representations contained in the application annexed, for a reasonable time, he is conclusively presumed to know the contents of the contract, and the untruthful answers plainly written in the application. He is thereby estopped to assert that he had no knowledge on the subject. * * * Even though the false answers were written by the examiners of the company without the knowledge of the assured, but the latter has the means at hand to discover the falsehood, and negligently omits to use them, he will be regarded as an instrument in the perpetration of the fraud, and no recovery can be had on the policy. * * *

[1] We do not question the soundness of the principle urged by appellant, but it is ap-

parent from a cursory reading of the facts that they have no application. No findings were made which charged the insured with actual or implied complicity in the mistake of the soliciting agent, or which in any way impugn the good faith of the insured, and our examination of the record does not disclose sufficient facts, in view of all the testimony, upon which any such findings could properly have been made. In any event, the trial court has settled that question and no showing has been made upon which its findings can be disturbed. Under such circumstances, different principles must be applied which are also enunciated in the Layton Case where the court says at pages 205, 206 of 55 Cal. App., 202 P. 958, 960: "But it has been held in this state that when the insured in good faith makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely a medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, even though it is so stipulated in the application * * * subject to the limitation that there must be no complicity on the part of the insured, actual or implied. The element of continued good faith enters into such transactions." To the same effect see *La Marche v. New York Life Ins. Co.*, 126 Cal. 498, 58 P. 1053; *Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 415, 18 P. 758, 9 Am. St. Rep. 216.

In the case of *Lyon v. United Moderns*, 148 Cal. 470, 83 P. 804, 806, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672, the court, quoting from Cooley's Briefs on the Law of Insurance, vol. 3, p. 2594, says as follows: "From an examination of the cases the following propositions may be regarded as established by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, though it is so stipulated in the application or policy."

[2] There can be no question that Rose, the soliciting agent, when he obtained the application and wrote in the answers to the questions, was the agent solely of the appellant company. *La Marche v. New York Life Ins. Co.*, supra, page 502 of 126 Cal., 58 P. 1053. It is undisputed that the name and address portions of the application were unfilled at the time it was signed. It is apparent in the light of the evidence that Rose had been continuously calling at the correct address of the insured; that he felt it was unnecessary to ask the name of the insured or the address, because he knew both; and that he intended to do just as he said he would, fill out afterwards the name and address of the insured. It is also obvious that he inadvertently inserted Long Beach in lieu of Wilmington, possibly because he lived in Long Beach and completed the application when he arrived at his home. There is nothing in the evidence to indicate fraud either on the part of the agent or the insured. It is obvious, on the contrary, that neither Rose nor the insured intended to do anything to deceive the insurer. It is also clear that the mistake which occurred was the company's mistake because it was made by the company's agent acting at that time solely for the company. *Layton v. New York Life Ins. Co.*, supra, page 206 of 55 Cal. App., 202 P. 958.

[3, 4] It will also be observed that the paragraph of the certificate requiring notice of change of address does not require such notice to be in writing. Notice is required to be given at its home office in Los Angeles. It is admitted that the insured did not give notice at the home office in Los Angeles. The court found, however, that notice was given to Rose, who in turn notified the president of the company at the president's home in Long Beach, and that the president stated that he would have the address corrected on the books of the company. In this connection, appellant urges most vigorously that Rose for the purpose of causing the correction in the address was the agent of the insured, and not that of the company, and that even considered as a soliciting agent his duties were circumscribed, and that any request made to him and his reply that he would take care of it is not binding on the company any more than if the insured had sent some third party entirely unconnected with the company. Conceding arguendo that this is true, we fail to see its application. Rose was not the person who waived compliance with the strict provisions of the notice clause. It was the president of the company who made the waiver. We have no difficulty in holding that the in-

insured complied sufficiently with the provisions of the certificate, since the proved facts show that the chief executive of the company received such notice and accepted it. There can be no question as to the right of such an executive to waive the strict provisions of the policy and accept notice in the form in which it was given. *Berliner v. Travelers' Ins. Co.*, 121 Cal. 451, 53 P. 922; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 P. 869, 17 Am. St. Rep. 233; *Mayer v. Mutual Life Ins. Co. of Chicago*, 38 Iowa, 304, 18 Am. Rep. 34.

In our treatment of the appeal, we have assumed that the excerpted portions of the certificate are applicable to the facts, but it has undoubtedly been discerned that this is not a case of change of address at all. There is a real question whether the provisions of the certificate, which appellant invokes and upon which it relies, have any application to the facts. The insured resided at the same place before, at the time, and after the application was signed. The insured never changed his address.

The judgment is therefore affirmed; the order denying motion to vacate the judgment is likewise affirmed, and the appeal from the order denying the motion for new trial is dismissed, since there can be no appeal from this order. Code Civ. Proc. § 963.

We concur: CONREY, P. J.; YORK, J.



4 Cal.App.2d 401

DIGHTON v. MARTIN et al.
Civ. 8725.

District Court of Appeal, Second District,
Division 1, California.
Feb. 5, 1935.

1. Master and servant ⇨389

Employer's application under Compensation Act for lien on employee's judgment against third party tort-feasor may be filed any time before satisfaction of judgment (St. 1931, p. 2370, § 26).

2. Master and servant ⇨349

Under Compensation Act making provisions thereof inapplicable to antecedent injuries, except as to procedural matters, statutory amendment authorizing employer's application for lien on employee's judgment

against third party tort-feasor *held* to involve "procedural matter," and hence such amendment authorized application for lien filed prior to satisfaction of judgment in employee's action for injuries suffered before amendment became effective (St. 1931, p. 2370, § 26; St. 1917, p. 879, § 73).

[Ed. Note.—For other definitions of "Procedural Matter," see Words & Phrases.]

3. Master and servant ⇨389

Compensation Act, before 1931 amendment, did not contemplate that subrogation of employer to employee's rights against third party tort-feasor should include damages recovered by employee for pain and suffering, and amendment giving employer lien on employee's entire judgment *held* not intended to authorize lien on segregated damages for pain and suffering, but amendment merely obligates employee to cause segregation thereof to defeat lien (St. 1917, p. 832, § 1; St. 1931, p. 2370, § 26).

4. Damages ⇨38

Decreased earning capacity is vital element for damages in personal injury action.

5. Pleading ⇨406(9)

In personal injury action, where evidence of special damages is admitted in absence of specific objection, general verdict may properly include all items of special damages, although not alleged.

6. Appeal and error ⇨926(5)

Every presumption on appeal being against error, appellate court would assume, in absence of showing to contrary, that evidence of special damages was received in employee's action against third party tort-feasor, and would not assume, as appellant employee did, that all damages recovered were for pain and suffering, precluding employer from acquiring lien thereon under Compensation Act (St. 1931, p. 2370, § 26).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Katherine F. Dighton against W. A. Martin, wherein the Real Silk Hosiery Mills, Inc., filed an application for a lien on the judgment. From an order granting the lien, plaintiff appeals.

Affirmed.

Clark & Morgan, of Alhambra, for appellant.

Hill, Morgan & Bledsoe, Kenneth K. Wright, and W. M. Farrer, all of Los Angeles, for respondent.

ROTH, Justice pro tem.

Appellant, in an action for personal injuries sustained January 21, 1931, recovered a judgment entered on May 14, 1932. At the time of the accident, appellant was the employee of Real Silk Hosiery Mills, Inc., respondent herein, performing duties within the scope of her employment. During the pendency of the action and before satisfaction of judgment, appellant's employer, respondent herein, filed an application for a lien against the judgment, pursuant to the provisions of section 26 of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 854), as amended in 1931 (St. 1931, p. 2370). On motion after notice the application was heard, whereupon an order was made and entered on June 24, 1932, granting to respondent a lien against the judgment in the amount of \$1,599.08, which sum included \$559.70 for medical, surgical, and incidental expenses and the balance applicant's disability compensation, all of which was paid by respondent to appellant, pursuant to an award of the Industrial Accident Commission. The appeal is from this order. The record on appeal is the judgment roll and the record of proceedings relating to said claim of lien.

In her complaint appellant sets out no special damages, alleging generally confinement to her bed for a period of four months, permanent partial disability, pain, and suffering, as damages to be compensated. The jury brought in a verdict of \$6,000, on which judgment was entered. No special interrogatories were put to the jury on the subject of damages. The record on appeal being as above stated, it cannot be ascertained what the evidence was on the subject of damages.

Under the provisions of section 26 of the Workmen's Compensation Act, as amended in 1931, an employer, who has paid, or become obligated to pay, compensation to, or to make expenditures for, an employee for disability suffered in the course of employment as a result of the negligence of a third party, has rights of subrogation to the "amount of the employer's expenditures for compensation," which the employer may exercise in any one of three ways. He may bring an independent suit, he may join in an action with the injured employee, or, "if the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court shall, on application of the employer, allow as a first lien against the entire amount of any judgment for any damages recovered by the employee the amount of the

employer's expenditures for compensation.
* * *

[1] The act does not specifically indicate when an application for a lien against the judgment must be filed in the event that method of subrogation is elected, although the language of section 26, immediately succeeding that which has been quoted, suggests that such an application may be filed at any time before satisfaction of judgment, and it has been so held. *Jacobsen v. Industrial Acc. Comm.*, 212 Cal. 440, 448, 299 P. 66.

The excerpted portion of section 26 of the Workmen's Compensation Act was amended in 1931 to read as it has been quoted. At the time of the accident which resulted in the disability suffered by appellant, the 1931 amendment was not effective, but it had become so prior to September 27, 1931, at which time respondent filed its application for the lien.

[2] Section 73 of the act (St. 1917, p. 879) specifically provides that its provisions shall not apply to injuries sustained prior to its effective date, except as to matters of procedure. The case of *County of San Bernardino v. Industrial Acc. Comm.*, 217 Cal. 618, 20 P.(2d) 673, settles the fact that the amendment to section 26, as applied to the facts here involved, is a procedural change, and applies to all proceedings had, taken, or completed subsequent to its adoption.

[3] Appellant's contention is that, if an employer has the third remedy, and if he can exercise it independently of the other two at any time before satisfaction of judgment, as he undoubtedly can, then an employer in many cases would have a lien against damages recovered by the employee for pain and suffering, and that such in fact is the situation in this case. To avoid such a result, appellant argues that an employee, in order to protect himself, would be compelled, in every case where the employer has not filed an independent suit or joined in the action with the employee, to act for his employer in an endeavor to recover all sums which the employer had paid to him as a result of an award made by the Industrial Accident Commission. In short, that the protection of the employer's rights is cast upon the employee, contrary to the law as it existed prior to 1931. *Ansbach v. Department of Industrial Relations*, 99 Cal. App. 677, 279 P. 224; *Jacobsen v. Industrial Accident Commission*, supra, page 448 of 212 Cal., 299 P. 66.

It is clear, and it has been held prior to the 1931 amendment of section 26, that it was not

contemplated that the subrogation rights given to an employer should extend to damages recovered by the employee for pain and suffering; the sole purpose of the subrogation provisions being to prevent the employee making a double recovery for loss of work and other items of special damage to the detriment of his employer. *Jacobsen v. Industrial Accident Comm.*, supra, page 447 of 212 Cal., 299 P. 66.

Ansbach v. Department of Industrial Relations, supra, decided prior to the 1931 amendment, holds, at page 680 of 99 Cal. App., 279 P. 224, 225, that, although the act in question gives to the Industrial Accident Commission authority to take into account pain, grief, and suffering "which are present and which affect the employee's then 'ability to work,' nowhere in the express terms of the statute, or in the judicial decisions of this state * * * may be found any indication that past 'physical pain and mental anguish' endured by the employee may be compensated." See, also, *Jacobsen v. Industrial Accident Comm.*, supra, page 447 of 212 Cal., 299 P. 66.

It is apparent, therefore, that the lien of an employer would not, prior to the amendment, attach to damages recovered for past pain and suffering, or to any pain and suffering that does not become an element in fixing a present disability. The *Ansbach* Case further holds that, when the employer has had timely notice of the proceedings and participates therein, the burden is placed on the employer to cause the damages to be segregated so as to permit the application of his lien to so much of the judgment as is rendered for disability, as distinguished from pain and suffering.

As amended in 1931, section 26 of the act specifically allows the employer "a first lien against the entire amount of any judgment for any damages recovered by the employee. * * *" Since the amendment was passed after the decision of the *Ansbach* and *Jacobsen* Cases, it might be inferred that the Legislature intended to make damages recovered for pain and suffering lienable, irrespective of a segregation of the elements of damage. We are not prepared to so hold. We believe that the amendment lends itself to a more reasonable construction, and one which is more in consonance with the spirit and intent of the act, as expressed in section 1 thereof (St. 1917, p. 832), and as announced by various decisions of our courts. A more natural conclusion to be drawn is that the Legislature intended that the employee should be ob-

liged to protect his right to damages for pain and suffering free from any lien of his employer by causing a court or jury to segregate damages awarded, so that it will clearly appear what portion is allowed for pain and suffering.

That confusion existed prior to the 1931 amendment as to the manner in which the rights of employer and employee were to be protected, and particularly as to the manner of subjecting a judgment recovered by an employee to the lien of an employer, is indicated by the court in the *Jacobsen* Case, where it is said: "It is, indeed, unfortunate that the statute does not in more detail provide the procedure for such segregation, but the lack of procedure does not necessarily defeat the power of the court to exercise its functions thereunder." *Jacobsen v. Industrial Accident Comm.*, supra, page 449 of 212 Cal., 299 P. 66, 69.

Whereas the *Jacobsen* and the *Ansbach* Cases hold that an application for a lien may be made at any time before satisfaction of judgment, the court in the case of *Lidberg v. E. T. Leiter & Son*, 116 Cal. App. 312, p. 316, 2 P.(2d) 526, 528, says: "It will be noted that the rights of the employer as to past expenditures were fully protected in the *Jacobsen* Case by its assertion of a lien for that purpose prior to judgment. The law thus gives to the employer and to his insurance carrier a simple means of protection and, because of the necessity of segregating the lienable portion of the judgment or verdict from the unlienable, the proper time to assert such a lien is before the judgment or verdict is entered."

Although under the law the employer may bring an independent action against a third party tort-feasor to recover damages which he has paid to his employee, practically the initiation and control of such litigation resides with the employee. The statute provides that the employee, when he brings an action against a third party tort-feasor, must give notice thereof to his employer. Not infrequently, however, the employee has overlooked this duty; not infrequently, cases have gone to judgment before the employer has had any notice of an action by an employee. The pertinency of these observations is emphasized by the facts in the case at bar. Appellant gave no notice to respondent, as required by section 26, of the commencement of his action. Some months after the action had been filed, respondent, learning of the same, filed notice of its claim of lien setting forth in detail all of the items which were

ultimately allowed to it. This notice was filed in the action and served upon appellant's attorney in ample time before trial. Appellant thereafter proceeded to trial without notice of any kind to respondent; thus respondent, through no fault of its own, but because of inadvertence or calculation on the part of appellant, did not have opportunity to appear and insist upon a segregation of damages prior to judgment, as seems to be required by the Lidberg Case. Such a situation is manifestly unjust to the employer, and it is our belief that, to prevent a recurrence of such situation or similar ones, the amendment to section 26 of the act herein discussed was made.

[4-6] Aside from the fact that appellant in the instant case requested no such segregation of damages and none was made, there are other reasons why the appellant's contention must fall. It is true that appellant did not ask for special damages. She did, however, allege confinement to her bed for approximately four months and permanent partial disability for the remainder of her lifetime. Appellant's assumption, in the absence of a record specifically calling attention to the evidence that all damages recovered were for pain and suffering, is a violent one, since there is no question but that decreased earning capacity is a vital element for damages in an action for personal injuries. *Leiner v. Eng-Skell Co.*, 104 Cal. App. 228, 285 P. 905; *Worden v. Central Fireproof Bldg. Co.*, 172 Cal. 94, 155 P. 839; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513. In addition, it is not infrequent in actions for personal injuries, in the absence of specific objection, that evidence of special damages is admitted, even though there are no allegations of such special damages. Under such circumstances, the jury in its general verdict could include all such items of special damages. *Ryan v. Oakland Gas, etc., Co.*, 21 Cal. App. 14, 130 P. 693. Every presumption on appeal being against error by the trial court, we may and do assume that such evidence was in fact received. *Borges v. Dunham*, 169 Cal. 83, 145 P. 1011; *Hibernia Savings & Loan Soc. v. Doran*, 161 Cal. 118, 118 P. 526.

Finally, it appears from the record, as already stated, that the application for lien was made, and that subsequently, after judgment and before satisfaction thereof, such application was heard on notice before the same judge who presided at the trial and heard the evidence. Appellant was present at the hear-

ing, the claim of the employer was substantially in the amount that was allowed, and the record indicates that the court had before it evidence sufficient to support the order. Appellant has shown nothing to the contrary.

The order is affirmed.

We concur: CONREY, P. J.; YORK, J.



4 Cal.App.2d 431

**MARTIN v. BANK OF AMERICA TRUST
& SAVINGS ASS'N et al.**
Civ. 9208.

District Court of Appeal, Second District,
Division 2, California.
Feb. 7, 1935.

Hearing Denied by Supreme Court
April 8, 1935.

1. Trusts ⇨234

Bank holding corporate bonds as trustee under declaration of trust *held* without authority to deposit bonds with bondholders' protective committee under agreement giving committee title and lien for expenses, though trustee's attorney advised deposit of bonds and that course may have appeared more advantageous for beneficiary.

2. Limitation of actions ⇨103(4)

Cause of action of beneficiary against trustee for conversion of bonds delivered under declaration of trust and deposited by trustee with bondholders' protective committee without authority did not accrue until beneficiary discovered that trustee had repudiated its obligation under trust (Code Civ. Proc. § 338).

3. Trusts ⇨262

Evidence *held* sufficient to support finding as to market value of bonds in action by beneficiary against trustee for value of bonds deposited with trustee which trustee without authority surrendered to bondholders' protective committee.

Appeal from Superior Court, Los Angeles County; M. G. Woodward, Judge.

Action by Ada S. Martin against the Bank of America Trust & Savings Association and others. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Freston & Files, Ralph E. Lewis, and Louis Ferrari, all of Los Angeles (Edmund Nelson, of Los Angeles, of counsel), for appellant.

Bernard Potter, C. A. Doody, and O'Melveny, Tuller & Myers, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment against defendant bank for the value of certain bonds, and from such judgment the latter appeals.

It appears that plaintiff owned thirty-six bonds of a par value of \$1,000 each, secured by a trust indenture on real property near Los Angeles. She joined certain others in executing, as trustors, a declaration of trust naming defendant bank as trustee and some third persons as beneficiaries. The trustors deposited with the bank as trustee bonds of par value of \$150,000, including plaintiff's thirty-six together with certain other property, all of which said property was to be held in trust in subordination to bonds of the beneficiaries, thereby in effect making the bonds of the latter persons preferred bonds. This trust was started in July of 1927. Within less than a year, the bonds being in default, a bondholders' protective committee was formed in June of 1928 under an agreement entered into by certain bondholders not including plaintiff. After various postponements, the property securing the bonds was sold under foreclosure on December 17, 1928, and was bought in by this committee. At the time of the sale, the entire issue of bonds outstanding was \$1,749,000, and there had been intrusted to the bondholders' protective committee, under an agreement with it, all but \$80,000 of these bonds. The property was bid in by the committee at \$711,000. On this basis, bondholders who had not placed their bonds in the hands of the committee were entitled to about 39 per cent. of the par value of their bonds in cash—thereby sustaining approximately a 61 per cent. loss. The bondholders who had come in under the agreement were entitled to an undivided interest in the property in the proportion that their number of shares bore to the total number that were embraced in the protective agreement. When the property was thus bought in at foreclosure sale by the bondholders' protective committee, it was at once incumbered to secure money to pay the bondholders who had not come in, and to use for other purposes. This incumbrance was later foreclosed, the property was lost, and the shares of the bondholders in the enterprise became valueless.

Two days before the property was sold under the first foreclosure, to wit, December 15, 1928, defendant bank deposited the bonds of plaintiff with the bondholders' protective committee, and signed the agreement required by said committee, and the loss of the bonds was thereby incurred as above related. The trial court gave judgment for plaintiff for \$14,400, plus interest at 7 per cent. from date of sale of the property, based upon a finding that said principal sum was the reasonable market value of the bonds on that date.

The trial court made findings of fact essentially as above outlined, and further found that, by reason of the termination of the said trust which had been entered into in July, 1927, plaintiff, on June 12, 1931, became entitled to the bonds, that she demanded them of defendant bank on February 19, 1932, and that the latter has failed and refused to deliver any of them. If further found that defendant bank had no right or authority to part with possession of the bonds; that it parted with all control over them when they were deposited under the bondholders' protective agreement; that plaintiff did not know of this latter action prior to March 1, 1929; that she had not approved nor ratified it, and was not estopped to proceed against defendant; that, in addition to their being held under the trust agreement, these same bonds, at the time defendant bank turned them over to the bondholders' protective committee, were also being held by it as security for payment of a promissory note owing by plaintiff to the bank, which was originally \$30,000, but had been reduced to \$24,000; that plaintiff paid the note October 22, 1929, and on demanding her bonds was told they were being held under the trust agreement; that there is no evidence of bad faith of defendant bank in depositing the bonds with the committee; and that in doing so it acted in good faith, believing said deposit was of advantage to plaintiff.

[1] It cannot be questioned that appellant parted with custody and control over respondent's bonds when it deposited them with the bondholders' committee under agreement with the committee which vested them with legal title and said that "no limitation is imposed on the powers of the committee as the legal owner of such bonds except the duty of doing whatever in its opinion is calculated to promote the best interest of the depositing bondholders," and appointed said committee its attorney in fact with full power, giving it a lien on the bonds for all expenses and dis-

charging committee members of liability except for personal willful misconduct in dealing with the bonds.

Appellant relies on section 31 of the trust agreement, under the terms of which the bonds were placed with it in July, 1927, which is as follows: "During the continuance in force of this trust, the trustee may exercise any and all rights of every kind or nature whatsoever at any time incident to the ownership of any subordinated bonds at any time held in trust hereunder by the trustee." It contends that its action was amply justified because of the dilemma which confronted plaintiff as owner of the bonds: (1) To remain outside of the bondholders' agreement and get but 39 per cent. of par value of the bonds; or (2) to join in the agreement and get an undivided share of property worth at least as much as the par value of outstanding bonds and appraised at various figures much in excess of that amount. The ultimate loss of the property is attributed to the economic depression, which is declared to have been beyond the predictions of reason.

On this point the position of the bank cannot be sustained because of terms of the trust agreement other than that quoted which precluded any such latitude on its part in dealing with the bonds. Without quoting the trust agreement, it appears that trustee, defendant bank, accepted the bonds in trust to hold them for the benefit of the holders of preferred bonds, to perform certain functions incidental thereto, and at the conclusion of the trust to hold any property then in its hands subject to order of the legal owner. There is nothing in the trust agreement to warrant a construction of section 31 which would permit appellant to relinquish possession and control of the subject-matter of the trust. The defense that it may have appeared to the bank that the course it followed was more advantageous to respondent than to secure for her the cash market value of the bonds is not available to it, in view of the provisions of the trust agreement. It might be observed that, although the property securing the bonds was appraised at more than the total value of the bonds at the time of the sale, there was apparently no bid for a greater amount than the one accepted by the committee, which was about 39 per cent. of the total par value of the bonds.

"If a trustee enters into any arrangement in relation to trust funds which surrenders or limits his control over them, he becomes a guarantor of the fund, irrespective of his motive, or whether his surrender of control was

the cause of the loss of the fund. In such case, in the event of loss, the court will not enter upon an inquiry whether the loss is due to such abdication of control." *Gaver v. Early*, 191 Cal. 123, 126, 215 P. 394, 395. See, also, 26 R. C. L. 1281, § 131.

This is not a case of an active trust in which the trustee is vested with plenary powers, and the trust agreement nowhere directly or by inference permits a surrender of control and direction to another. 44 L. R. A. (N. S.) 873, note. "The making of investments is fundamental, and not merely administrative, in administering the trust; consequently, in accordance with the general rule, the making of investments cannot be delegated by the trustee to another." 65 C. J. 797, § 672. The advice of its attorney cannot shield defendant from responsibility. In *re Holbert's Estate*, 48 Cal. 627.

[2] Appellant contends that this suit was barred by section 338, Code of Civil Procedure, fixing a three-year limitation on such an action for tort for conversion of the bonds. It would seem, however, that, if appellant's designation is correct, and if the action is not merely one for breach of a written contract, as urged by respondent, nevertheless the statute would not bar recovery. "If the original taking be wrongful, the bar of the statute runs from the time of the unlawful taking; but where the original taking is lawful, the statute is not set in motion until the return of the property has been demanded and refused, or until a repudiation of the owner's title which is clearly and unequivocally brought home to him, is made." 16 Cal. Jur. 525, § 124; *Varrois v. Gomett*, 43 Cal. App. 756, 185 P. 1001; *Odell v. Moss*, 130 Cal. 352, 62 P. 555. From the record it is apparent that the action filed March 15, 1932, was instituted within three years from the discovery by plaintiff of the repudiation by appellant of its obligation under the trust.

[3] It is finally suggested that the finding of the trial court as to the market value of the bonds is not supported by any evidence. The par value of the bonds was prima facie evidence of their value (*Revert v. Hesse*, 184 Cal. 295, 193 P. 943); and evidence was produced sufficient to support a finding that the market value of the bonds was at least 39 per cent. of such par value, for which amount judgment was rendered.

Judgment affirmed.

We concur: STEPHIENS, P. J.; CRAIL, J.

4 Cal.App.2d 472

BRUSKEY v. BRUSKEY.

Civ. 1429.

District Court of Appeal, Fourth District,
California.
Feb. 8, 1935.

1. Dismissal and nonsuit Ⓒ43(5)

On motion to vacate order dismissing action, trial court could consider not only affidavits filed with motion, but also original and amended complaints which were verified (Code Civ. Proc. § 473).

2. Appeal and error Ⓒ982(1)

Granting or refusal of relief under statute authorizing court to relieve party or his legal representative from judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect is within discretion of court to whom application is presented, and abuse of discretion must clearly be made to appear to warrant reviewing court in disturbing trial court's action (Code Civ. Proc. § 473).

3. Appeal and error Ⓒ1129

Law favors, wherever possible, hearing on merits, and appellate courts are much more disposed to affirm order, result of which is to compel trial on merits, than is true when judgment from which relief is sought is allowed to stand, particularly when it appears that trial might result in rendition of different judgment (Code Civ. Proc. § 473).

4. Judgment Ⓒ363

Party who seeks relief from judgment or order taken against him must show that, due to mistake of fact or law, of himself or of his counsel, or through some inadvertence, or surprise, or excusable neglect, judgment or order was entered (Code Civ. Proc. § 473).

5. Dismissal and nonsuit Ⓒ43(4)

Plaintiff at whose instance action was dismissed *held* not entitled to have order dismissing action vacated on ground that advice given to plaintiff by her attorney on theory of agency was given under mistake as to law, where record did not disclose what advice attorney gave on theory of agency (Code Civ. Proc. § 473).

6. Dismissal and nonsuit Ⓒ43(4)

Plaintiff at whose instance action against father for injuries sustained through negligent operation of father's automobile by plaintiff's sister was dismissed *held* not entitled to order vacating order of dismissal on ground that plaintiff's attorney was guilty of excusable neglect in failing to join sister as codefendant, where original and amended complaints disclosed that action was founded on doctrine of imputed negligence, and rec-

ord showed no excuse for attorney's failure to have joined sister as codefendant (Code Civ. Proc. § 473; Civ. Code, § 1714¼).

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Anna Bruskey against Albert Bruskey. From an order vacating a prior order which dismissed the action on plaintiff's motion, defendant appeals.

Reversed.

Irving E. Read, of Los Angeles (Paul Nourse, of Los Angeles, of counsel), for appellant.

Head, Wellington & Jacobs, of Santa Ana, for respondent.

JENNINGS, Justice.

The order from which this appeal is taken is an order made November 14, 1932, vacating a prior order made on July 19, 1932, dismissing the action on plaintiff's motion. The motion for vacation of the order of dismissal was made under section 473 of the Code of Civil Procedure, which provides that: "The court may * * * relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. * * *" Appellant concedes that a trial court is vested with a wide discretion in the matter of granting or denying motions for relief under section 473, but contends that the court may not act arbitrarily under the guise of exercising judicial discretion, and maintains that the affidavits of plaintiff which furnished the only evidence upon which the court could have based its order entirely fail to show that plaintiff labored under any mistake, inadvertence, or surprise, or was guilty of any excusable neglect in moving to dismiss the action.

Three affidavits were filed by the plaintiff in support of her motion to vacate the order of dismissal. These are: (1) An affidavit of plaintiff herself; (2) an affidavit of plaintiff's brother Oscar Bruskey; and (3) an affidavit of her attorney.

Plaintiff's affidavit may be summarized as follows: That prior to entry of order of dismissal her attorney informed her that the action had been brought upon the theory of agency, "and that after considering the matter upon the statements of her attorney she consented to have said case dismissed upon payment to her" of the sum of \$100; that

she was subsequently informed by her brother that he had interviewed a representative of the Automobile Club and had also interviewed the chief counsel of said club and had been advised by them that plaintiff had a good cause of action and that, if the attorney representing her had properly brought the suit, it was probable she would have recovered damages; that plaintiff was also informed that her failure to recover was due to her attorney's mistake, that the attorney erred in advising her to have the action dismissed. The question which is presented with respect to this affidavit is, What mistake or inadvertence or neglect of plaintiff is there shown which caused the making of the order of dismissal that could justify the trial court in vacating it? The only mistake or inadvertence or neglect which appears from the affidavit is that the affiant was informed that if her attorney had properly brought the action she would probably have recovered damages and that her failure to recover was due to her attorney's mistake, and that the attorney had erred in advising her to dismiss the action. It may further be noted that the affidavit entirely fails to disclose what the mistake of her attorney was or how he had improperly brought the action, or in what respect her attorney erred in advising her to dismiss the action. It should further be observed that the material allegations of the affidavit, if indeed there are such, are specifically stated to be based on hearsay. The affiant does not state that her attorney had made a mistake or had improperly brought the action or that he had erroneously advised her merely but that she had been informed that such was the case.

The affidavit of plaintiff's brother also consists entirely of purely hearsay allegations. In it the affiant states, first, that, after he had learned of the dismissal of the action, he interviewed a representative of the Automobile Club of Southern California, from whom the defendant had obtained insurance, and was informed that plaintiff should not execute releases in settlement of her action, that she was fully protected and had a good cause of action against the defendant; second, that together with the defendant he interviewed the chief counsel for the Automobile Club of Southern California and was advised that if the action had been properly brought plaintiff should have recovered substantial damages, that the insurance policy which defendant had obtained afforded full protection to plaintiff for the personal injuries sustained by her, and that, if it had not been for the mistake of her attorney, plaintiff should have

recovered in the action. Here again there is neither any allegation that the plaintiff had made any mistake, nor any direct allegation that the attorney had made a mistake. There is an intimation that plaintiff's attorney had made some sort of mistake which is based on pure hearsay, but there is no pretense of a statement as to what the mistake was.

The affidavit of plaintiff's attorney states that on the date on which the action was to be tried affiant received certain information from the plaintiff regarding the evidence which would be produced during the trial of the case which caused him to advise the plaintiff "that the action would have to be sustained on the theory of an agency and that it was his opinion that he could not be successful" in recovering damages for plaintiff, whereupon, the plaintiff, "after considering the matter," consented to a dismissal of the action upon payment to her of the sum of \$100; that affiant subsequently learned that the defendant had interviewed a representative of the Automobile Club and the chief counsel of said club, and that the defendant was advised by the latter that plaintiff had a good cause of action and that if the attorney who represented plaintiff had brought the action properly, plaintiff would have recovered damages; that by reason of the statements made by the chief counsel of the Automobile Club plaintiff was led to believe and now believes that she has a good cause of action against the defendant and that affiant erred in his advice to her, wherefore she has refused to accept the sum stipulated for the settlement of the case; that the chief counsel for the Automobile Club advised defendant and plaintiff's brother and affiant that if plaintiff's sister, Verner Bruskey, had been made a defendant in the action, "and that if negligence was established," plaintiff would have recovered against both defendants and that the insurance policy of the defendant would have afforded full coverage for any injuries suffered by plaintiff, "and that the insurance carrier would not have caused execution to be levied against Verner Bruskey"; that the statements of the chief counsel of the Automobile Club have caused plaintiff to believe that affiant was negligent in regard to her case.

An analysis of the allegations of the affidavit of the attorney demonstrates that it is not therein stated that the affiant made any mistake with reference to the institution of an action or in his advice to the plaintiff with reference thereto. The first statement in the affidavit is, that on the date appointed for the trial of the case the affiant received

certain information from the plaintiff which caused him to advise his client that he could not succeed in obtaining a recovery of damages for her. There is no allegation that the information which the attorney received was incorrect or that he made any mistake in advising plaintiff that he could not succeed in the trial of the case. There is no allegation that the plaintiff suffered from any mistake in consenting to a dismissal of the suit. The second statement contained in the affidavit is that the affiant, subsequent to the dismissal of the action, learned that the defendant in the action, who was the father of the plaintiff, had interviewed the chief counsel of the Automobile Club and that the defendant had been advised by the said counsel that plaintiff had a good cause of action, and that if plaintiff's attorney had brought the action properly plaintiff would have recovered damages. This allegation contains an intimation that plaintiff's attorney had made a mistake of some character in the institution of the suit, but there is no suggestion as to what the mistake was. Furthermore, and more important, it is a statement of pure hearsay. The third allegation of the affidavit is that the chief counsel for the Automobile Club informed affiant that if plaintiff's sister had been joined as a defendant in the action and if negligence had been established the plaintiff would have recovered, since the defendant's insurance policy would have afforded full protection to plaintiff for any injuries sustained by her, and the insurance carrier would not have caused execution to issue against plaintiff's sister. There is not contained in this allegation a statement that any mistake was made either by plaintiff or by her attorney in procuring the dismissal of the action. Moreover, the allegation is a statement of pure hearsay involving nothing more than the declaration of an opinion by a certain individual.

[1] The notice of motion to vacate the order of dismissal stated that the motion would be made on the ground "that the consent of plaintiff to the dismissal was entered through mistake, inadvertence, and excusable neglect." The notice further stated that the motion would be based "upon the notice of motion and all affidavits filed herewith and upon all the other records and files of the above-entitled action." The notice also indicated that leave of court would be sought "permitting plaintiff to file her amended complaint herewith served." The record shows that the aforesaid notice was served on the defendant on October 17, 1932, and that on the same date an amended complaint in the action was

also served on defendant. The record further shows that, on the same date on which the court granted plaintiff's motion to vacate the prior order dismissing the action, it granted her motion for permission to amend the complaint. It is clear, therefore, that at the time the order of dismissal was vacated the trial court had before it and was entitled to consider not only the affidavits to which extended reference has heretofore been made, but also the original complaint and the amended complaint, both of which were verified and were entitled to be considered by the court.

The original complaint alleges: That the plaintiff and Vertner Bruskey are the owners of certain property therein described; that a garage and driveway are located on the property; that on March 28, 1931, the defendant's automobile was in the garage and that it was negligently pushed out of the garage and down the driveway by Vertner Bruskey who had the same under her control at the time and was using it with the defendant's consent; that by reason of Vertner Bruskey's negligence in pushing the automobile out of the garage, the said automobile ran backward off the driveway and upon the plaintiff who was then standing in the proximity of the driveway; that by reason thereof plaintiff received certain personal injuries and incurred certain specified expenses. The prayer of the complaint is that plaintiff have judgment "against the defendants and each of them" for a specified amount.

The allegations of the amended complaint indicate that Vertner Bruskey was joined therein as a party defendant to the action, and that the cause of action against the defendant Albert Bruskey is based on imputed negligence as defined in section 1714¾ of the Civil Code. The facts stated in the amended pleading are identical with those which are alleged in the original complaint.

[2, 3] It is settled in this state that the granting or refusal of relief under the provisions of section 473 of the Code of Civil Procedure is a matter which rests in the discretion of the court to whom the application is presented, that the court's discretion in such matters is broad, and that an abuse thereof must clearly be made to appear to warrant a reviewing court in disturbing the trial court's action. *Waite v. Southern Pacific Co.*, 192 Cal. 467, 221 P. 204; *Waybright v. Anderson*, 200 Cal. 374, 253 P. 148. It is also the rule, for which there is ample authority, that it is the policy of the law to favor, wherever possible, a hearing on the merits, and for this

reason appellate courts are much more disposed to affirm an order the result of which is to compel a trial on the merits than is true when the judgment from which relief is sought is allowed to stand, particularly when it is made to appear that a trial might result in the rendition of a different judgment. *O'Brien v. Leach*, 139 Cal. 220, 72 P. 1004, 96 Am. St. Rep. 105; *Downing v. Klondike Min. & Mill. Co.*, 165 Cal. 786, 134 P. 970; *Berri v. Rogero*, 168 Cal. 736, 145 P. 95; *Waybright v. Anderson*, *supra*. The above principles are applicable to a case wherein a plaintiff consents to a dismissal of an action under a mistake of fact and upon learning of the mistake seeks to vacate the order of dismissal in accordance with the provisions of section 473 of the Code of Civil Procedure. *Palace Hardware Co. v. Smith*, 134 Cal. 381, 66 P. 474.

[4] Nevertheless, it is obvious that a party who seeks relief under section 473 of the Code of Civil Procedure must make a showing that, due to some mistake either of fact or law, of himself or of his counsel, or through some inadvertence, or surprise, or neglect which may properly be considered excusable, the judgment or order from whose effect he seeks to be relieved was entered. In other words, a burden is imposed upon the party seeking relief to show why he is entitled to it. The assumption of this burden necessarily requires the production of evidence. That the plaintiff appreciated this fact is demonstrated by the production of affidavits in support of her application for relief. Analysis of these documents indicates that, taken alone, they were insufficient to provide an evidentiary foundation for the court's action vacating the prior order of dismissal. However, as above noted, the court had before it at the time it passed upon the application for relief not only the affidavits, but also the entire record. It remains to discover whether this record containing the original complaint, the defendant's answer thereto, and the amended complaint then sought to be filed made out a sufficient showing to justify the trial court in exercising the very broad discretion reposed in it.

It is the contention of plaintiff that her motion for vacation of the order of dismissal was based upon a mistake of law by her attorney "in advising plaintiff on the theory of agency and his excusable neglect in failing to bring in a proper and necessary party defendant." In this connection, it is pointed out that the affidavit of plaintiff's attorney states that the chief counsel for the Automobile Club advised affiant that if Vertner Brus-

key had been joined as a codefendant in the action and that if negligence had then been established the plaintiff would have recovered against both defendants, and the insurance policy issued to defendant would have fully protected plaintiff in the collection of any amount awarded her as damages for her injuries, and the insurance carrier would not have caused execution to be levied against plaintiff's sister, Vertner Bruskey. It is then argued that this advice given to the affiant by the chief counsel for the association through whom defendant had obtained his insurance was not a mere voluntary statement of opinion, but was direct information regarding the merits of the case which was conveyed to plaintiff's attorney. The conclusion of this argument is that if the information thus conveyed to the attorney was true and if the attorney for plaintiff had theretofore been erroneously advised with respect to the policy of insurance which the defendant had obtained, and if the attorney's advice to the plaintiff which caused her to consent to the dismissal of the action was erroneous due to his lack of knowledge of the provisions of defendant's insurance policy, then the trial court committed no abuse of discretion in making the order from which this appeal has been taken.

[5] The above-analyzed elaborate argument is not persuasive. Its fundamental premise appears to be that the advice given to plaintiff by her attorney "on the theory of agency" was given under a mistake as to the law, and, further, that the attorney was guilty of excusable neglect in failing to join as a codefendant in the action plaintiff's sister, Vertner Bruskey, who was a proper and necessary party defendant thereto. However, it nowhere appears in the record what advice the attorney gave to plaintiff "on the theory of agency," and it is therefore inconceivable that the trial court could have discovered that the attorney was mistaken as to the law.

[6] It is equally difficult to sustain the contention that plaintiff's attorney was guilty of excusable neglect in failing to join plaintiff's sister as a codefendant in the action. It may be conceded that the attorney was guilty of neglect in this respect if the cause of action, as appears both from the original complaint and the amended complaint, was founded on the doctrine of imputed negligence as declared by section 1714¼ of the Civil Code. Section 473 of the Code of Civil Procedure provides that a party or his legal representative may be relieved from a judgment, order, or other proceeding taken against him

through his excusable neglect. The record is entirely lacking in any showing of excuse for the attorney's failure to have joined plaintiff's sister as a codefendant. Plaintiff's reasoning in this regard appears to be that her attorney was ignorant of the provisions of the insurance policy issued to the defendant and did not know that it would cover a case of imputed negligence at the time he advised plaintiff to accept the sum of \$100 in settlement of the case and to dismiss the action; that subsequent to the dismissal of the action plaintiff's attorney was advised by the chief counsel of the Automobile Club, through which the defendant had obtained insurance, that the insurance policy issued to defendant covered a case of imputed negligence and would have afforded full protection to plaintiff if plaintiff's sister had been joined as a codefendant in the action; and that in such event if negligence was established the plaintiff would have recovered against both defendants. It is difficult to understand how it may be argued that the attorney's lack of knowledge of the provisions of an insurance policy issued to the defendant Albert Bruskey could operate as an excuse for his failure to join the operator of the automobile as a defendant in an action based on negligence imputed by law to the owner of the automobile because of the fact of ownership. Presumably, the inference which is sought to be conveyed is that if the attorney had been informed as to the provisions of the defendant's insurance policy and that it covered a case of negligence imputed through ownership he would have joined plaintiff's sister as a codefendant. An obvious difficulty with this line of reasoning is that the record does not disclose that the trial court was advised by proper evidence that the defendant's insurance policy did cover a case of imputed negligence. The affidavit of plaintiff's counsel does not purport so to declare. It does state that the attorney was advised by the chief counsel of the Automobile Club that the insurance policy "would have fully protected the plaintiff for any judgment of damages." It is said that this was direct information in regard to the merits of the case derived from an individual who was chief counsel of the association through which the defendant had procured insurance. This suggestion is devoid of merit. Surely, it requires some straining of the legal imagination to urge that information regarding the provisions of the defendant's insurance policy is information respecting the merits of this action. Furthermore, an affidavit of the chief counsel of the Automobile Club was filed as a counter affi-

davit in opposition to the motion by the defendant. This affidavit contained the only information placed before the trial court as to the insurance company which had issued the policy of insurance to the defendant. It is therein alleged that the defendant called upon the affiant and stated to him that the reason for the dismissal of the action was that the plaintiff had been told by her attorney "that the policy of said automobile liability insurance, which the defendant had obtained from the Standard Accident Insurance Company of Detroit, Michigan, through the Automobile Club of Southern California, was not adequate to protect plaintiff's sister, Vertner Bruskey, who was in charge of defendant's car at the time plaintiff received her injuries." It is therefore clear that the information which is set out in the affidavit of plaintiff's attorney as having been conveyed to affiant by the chief counsel of the Automobile Club to the effect that defendant's policy of insurance would have fully protected the plaintiff in the collection of any damages awarded to her was a hearsay declaration, amounting simply to a statement of opinion emanating from an individual who was in no way connected with the insurance carrier which had issued the policy of insurance to the defendant. Finally, the matter of an insurance policy issued to the defendant is entirely immaterial to the problem which is here presented. Assuming that the defendant has a policy of insurance insuring him against public liability and that it is entirely adequate to assure to the plaintiff that she will be able to collect any award which she may receive as compensation for her injuries, and assuming further that plaintiff's attorney was totally ignorant of the provisions of the policy and did not know that it would cover a case of imputed negligence so that, in the event of the recovery of damages by plaintiff, she may enforce collection of her judgment by instituting an action on the policy, how can it be urged that this lack of knowledge by plaintiff's attorney constituted any excuse for his failure to have joined the operator of the automobile as a codefendant in an action based on imputed negligence? It is not pretended that plaintiff's attorney did not fully understand the provisions of the statute which permits recovery of damages based on the theory of imputed negligence. It was not shown to the trial court that the attorney was misinformed in any fashion as to the facts, or that he was uninformed as to any matter relating to the action other than that he lacked knowledge respecting the provisions of defendant's insurance policy

There was an entire failure to make any showing that the order of dismissal from which plaintiff sought relief was caused or affected by any mistake of fact or law either on the part of plaintiff or her attorney. It is not pretended that the plaintiff or her counsel was surprised in the entry of the order. Under the circumstances which are disclosed by the record, we are impelled to the conclusion that the trial court abused its discretion in vacating the prior order dismissing the action.

The order from which this appeal has been taken is therefore reversed.

We concur: BARNARD, P. J.; MARKS, J.



4 Cal.App.2d 589

HUMPHRY v. SAFEWAY STORES, Inc.,
et al.
Civ. 1513.

District Court of Appeal, Fourth District,
California.

Feb. 14, 1935.

Hearing Denied by Supreme Court
April 15, 1935.

1. Automobiles ☞ 193(8)

Relief manager of meat department in one of his employer's stores *held* not on employer's business or "acting within the scope of his employment" when his automobile, driven by him, collided with another automobile on his way to store after leaving report of preceding day's business at employer's office in another city, though accident happened after time at which he was required to begin work.

[Ed. Note.—For other definitions of "Scope of Employment," see Words & Phrases.]

2. Appeal and error ☞ 1001(1)

Whether automobile driver was on his employer's business or acting within scope of his employment at time of collision with another automobile *held* law question for appellate court, in absence of any evidence supporting jury's finding against employer on such question.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Wiltie E. Humphry against the Safeway Stores, Inc., and another. Judg-

ment for plaintiff, and named defendant appeals.

Judgment against appellant reversed.

Byrne & Coughlin, of San Bernardino, for appellant.

C. O. Thompson and Fred A. Wilson, both of San Bernardino, for respondent.

MARKS, Justice.

Respondent was injured on the morning of July 20, 1933, in an automobile accident which occurred in an intersection of public roads a little less than one mile south of Fontana in San Bernardino county. The automobile in which he was riding was being driven by J. M. Williams and came into collision with one owned and being driven by John Bachman, an employee of appellant. Respondent recovered judgment against both defendants. This appeal is taken by Safeway Stores, Inc.

[1] There is but one question presented which it is necessary for us to consider, namely, Was Bachman acting within the scope of his employment and upon his employer's business at the time of the accident?

Appellant operates retail stores in a number of cities in Riverside and San Bernardino counties and has its district office in the store in the city of Riverside in charge of A. C. Riggs as district manager. Bachman was in the employ of appellant as a relief worker in the Riverside store and had been for a period of over two years prior to the accident. When occasion demanded, he was given employment as relief manager of the meat departments of stores in the district outside of Riverside. These occasions would arise only when the regular managers were sick or on vacation. During the year preceding the accident, he had been employed as relief manager on several separate occasions which gave him an employment in that capacity for a total time of about five weeks. Each of these employments was separate and apart from any of the others and there was no arrangement whereby he filled all the requirements for a relief manager. In 1933 he also worked on Sundays for about four months in the store of appellant at Redlands.

Bachman lived in Riverside. He had an automobile with which he transported himself from his home to the store wherever he might be working outside of Riverside. Over two years before the accident he had received mileage of about 5 cents a mile for a period of five days when he was transporting himself between Riverside and the store in Elsinore. After that time, he received no mileage but

used his automobile for his transportation at his own expense.

While acting as relief manager, it was Bachman's duty to operate the meat department during the hours that the branch store was open. These hours varied in different cities. After closing hours, he was required to clean up the meat department, check the cash register, and make up a daily report of the business done and requisition needed supplies. According to instructions from Riggs, he was required to deposit the daily reports and requisitions in the mail at the place where he was working, addressed to the district office in Riverside. When the journey from the market to his home took him by this office, it was his habit to take the daily report with him and deposit it in the mail chute in the door of the main office.

On one occasion, about two years before the accident, Bachman transported meat in his automobile from the Riverside store to the Hemet store with which to fill a special order. This was done at the request of Riggs. On other occasions he transported stationery and printed matter from Riverside to other stores where he happened to be working. Riggs had no knowledge of these acts.

On July 17, 1933, Bachman was employed as relief manager of the meat department in appellant's store in Fontana. That store was kept open from 7 o'clock in the morning until 6 in the afternoon. He was required to report for duty at the opening time and was through for the day as soon after the closing time as he had cleaned the market and made out and mailed his daily reports. He continued to live in Riverside and traveled in his automobile between his home and the store in Fontana. As his journey took him by the main store in Riverside, he carried his reports with him and deposited them in the mail chute there. Appellant did not require that he live in Riverside, nor that he travel back and forth between his home and the place of his work. His place of abode was a matter of his own choosing as was the means of transportation used in going to and from his work. He could have lived in Fontana or any other place and have taken any available means of transportation he desired to get to and return from his place of employment. After Bachman's work was done, his employer had no control over him until his duties commenced on the following day.

On Wednesday evening, July 19, 1933, Bachman being desirous of attending a lodge installation in Colton, did not stop on his return from work to deposit his daily report in the mail chute, but left his home shortly

after 6 o'clock the next morning in his automobile, stopped at the main store in Riverside, deposited the daily report in the mail chute, and continued on his journey to Fontana. The accident in which respondent was injured happened on this journey and before he reached his destination.

The foregoing is a summary of all the evidence in the record bearing on the question before us. Under it appellant maintains that there is no evidence in the record supporting the implied finding of the jury that Bachman was on his employer's business or was acting within the scope of his employment at the time of the accident. This contention must be sustained. Among the many cases supporting this conclusion we cite the following: *Nussbaum v. Traung Label, etc., Co.*, 46 Cal. App. 561, 189 P. 728; *Mauchle v. Panama-Pacific International Exp. Co.*, 37 Cal. App. 715, 174 P. 400; *Kish v. Cal. State Automobile Ass'n*, 190 Cal. 246, 212 P. 27; *Hirst v. Morris & Co.*, 45 Cal. App. 358, 187 P. 770; *Enterprise Foundry Co. v. Ind. Acc. Comm.*, 206 Cal. 562, 275 P. 432, 433; *Dellepiani v. Ind. Acc. Comm.*, 211 Cal. 430, 295 P. 826; *Hall v. Puente Oil Co.*, 47 Cal. App. 611, 191 P. 39.

In *Enterprise Foundry Co. v. Ind. Acc. Comm.*, supra, the Supreme Court said: "Decedent's hours of employment were from 8 a. m. to 4:30 p. m., and in addition thereto he sometimes outlined his work for the following day while sitting at home after supper. On the morning of July 8, 1926, he left home about 7:30 a. m., evidently headed for his place of work. When but 2½ blocks from it, he was shot in the leg by some unknown party, who drove away in an automobile. The injury resulted in his death two days later. He left surviving him his wife and two minor children, respondents herein. The commission found that said injury was sustained in the course of and arising out of decedent's employment and made the aforesaid award in favor of his widow, which award petitioners here seek to have annulled. * * *

"The general rule, sometimes designated the 'going and coming rule,' which has been considered and applied by this court in numerous cases, is that, where the person injured is employed to perform service at or in a particular plant or upon particular premises, and where the injury claimed to be compensable is inflicted while he is going to or returning from his place of employment, or where he has left the place of employment on an errand personal to himself, said in-

jury inflicted under such circumstances is not compensable. * * *

"His method of going to and returning from work, which was of his own choosing and was separate and apart from his employment, remained as it had always been, uncontrolled and uninfluenced by his employer. * * * In other words, said injury having been received while the employee was walking to his work, prior to entry of his employer's premises, and at a time when he was not engaged in any service whatsoever for his employer, or any service incidental to or in the course of his employment, it is not compensable."

Respondent seeks to avoid the effect of the foregoing rule under authority of *Brown v. Montgomery Ward & Co.*, 104 Cal. App. 679, 286 P. 474, *London & Lancashire Co. v. Ind. Acc. Comm.*, 35 Cal. App. 681, 170 P. 1074, and similar decisions. In each of these cases the employee had a roving commission. His employment took him from a principal place of business over a considerable territory and back to his starting point. In each case the accident happened before the return to the starting point. *Bachman* had no such commission. His employment in each one of the stores outside of Riverside was separate from any other and was under a separate contract. When he was finished in one place, that particular employment was ended. He was employed during definite hours at a particular place. In fact it appears that *Bachman* was unemployed during the major part of the year preceding the accident. During the week of the accident, he was employed to work each day at Fontana from 7 o'clock in the morning until such time after 6 o'clock in the afternoon as he had completed his labors. The rest of the time was his own. As the accident happened before he reached his place of employment, he was on his own business, that of going to work, not on his employer's business.

Respondent suggests that as the accident happened after 7 o'clock in the morning, and as it happened during the time for which *Bachman* was paid, his employer should be held liable. One witness testified that he thought the accident happened after 7 o'clock. The great preponderance of the evidence fixed it before that hour. The time of the accident alone is not important. *Bachman's* duties for his employer did not commence before he reached the place of his employment. The mere dereliction of tardiness on his part could not alone fix liability on his otherwise blameless employer.

Because he was late in going to work could not make the journey to work any less his own business or any more his employer's business.

Respondent urges that "the delivery of the daily reports to the Riverside office was one of the duties of the 'relief manager,'" and from this he argues that the journeys between Riverside and Fontana were within his employment, and that while so traveling he was on his employer's business. The first fallacy of this argument is that the evidence does not support the quoted statement. The second is that it was a mere incident of his journey to and from work. *Eby v. Industrial Acc. Comm.*, 75 Cal. App. 280, 242 P. 901. The third is that his instructions were to mail the daily reports in Fontana. His taking them to the store in Riverside was a voluntary act on his part. However, if we may assume that the employer acquiesced in this act, it was completed when he deposited the report in the mail chute. Only on one occasion, the day of the accident, did he deposit a report on the morning following its date. On all other occasions he deposited the reports on the evenings of the days they were prepared. The duty, if it can be so considered, ended with the deposit of the report. Thereafter his time was his own and his employer had no control over him until he again reported for work at its place of business.

[2] Respondent urges that the question of whether the employee was on his employer's business and acting within the scope of his employment was one for the jury, and that body having resolved the question against appellant, the implied finding cannot be disturbed on appeal. He cites the cases of *Dillon v. Prudential Ins. Co.*, 75 Cal. App. 266, 242 P. 736, *George v. Chaplin*, 99 Cal. App. 709, 279 P. 485, and *Gayton v. Pacific Fruit Express Co.*, 127 Cal. App. 50, 15 P.(2d) 217, in support of the announced rule. We have no quarrel with the rule where there is a conflict in the evidence on the question, or reasonable conflicting inferences concerning it to be drawn from the evidence. In the instant case there is an entire lack of any evidence supporting the theory that *Bachman* was on his employer's business or acting within the scope of his employment at the time of the accident. Under this circumstance the question is one of law for the court, namely, Is the implied finding supported by any evidence? *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 574, 93 P. 377.

Appellant has appealed from an order denying its motion to retax the costs. As the judgment must be reversed, which will include the vacation of that portion of the judgment awarding respondent costs, it is not necessary to discuss the questions presented by the appeal from this order.

The judgment against appellant is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



4 Cal.App.2d 544

OIL TOOL EXCHANGE, Inc., v. HASSON

et al.

Civ. 1327.

District Court of Appeal, Fourth District,
California.

Feb. 13, 1935.

Rehearing Denied March 12, 1935.

Hearing Denied by Supreme Court
April 11, 1935.

1. Mines and minerals ⇨112(1)

Amendatory section granting to persons furnishing appliances contributing to the drilling of a well a lien for the value of use of such appliances, which grants a lien to persons other than those expressly mentioned in Constitution *held* valid (Code Civ. Proc. § 1183; Const. art. 20, § 15).

2. Mines and minerals ⇨112(4)

Drilling company furnishing tools and materials for drilling oil well *held* entitled to lien for rental of tools and equipment as against leasehold interest of assignee of lease and against the land where there was no proper proof of posting by owners of notice of nonresponsibility or proof to show when owners first gained knowledge of commencement of work (Code Civ. Proc. § 1183).

3. Mechanics' liens ⇨78

Statute subjecting improvement to liability for mechanic's lien unless owner files written notice of nonresponsibility and properly posts such notice must be strictly construed (Code Civ. Proc. § 1192).

4. Mines and minerals ⇨110

Assignee of oil and gas lease *held* personally liable for materials and equipment furnished in drilling well where person making purchases acted as agent of lessee as against contention that furnisher of materials and equipment knew that it was dealing with such person as agent of assignee of lease.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the Oil Tool Exchange, Inc., against Frank M. Hasson and others. From an adverse judgment, both parties appeal.

Reversed in part, and affirmed in part.

Raphael Dechter and B. L. Hoyt, both of Los Angeles, for plaintiff, appellant, and respondent Oil Tool Exchange, Inc.

Hazlett & Plummer and Robert J. Sullivan, all of Los Angeles, for defendants, appellants, and respondents Frank M. Hasson, Grace F. Hasson, and Cascade Oil Co.

ALLYN, Justice pro tem.

The defendants Hasson executed and delivered to the defendant White an oil and gas lease of their real property. White assigned to defendant Cascade Oil Company. The oil company and White, with the Wicker Drilling Company, entered into a drilling contract whereby the latter parties undertook to supervise the drilling of a well on the property. Work was begun under this contract, but it was terminated by mutual agreement and a second drilling contract made, identical in terms with the first except that White alone undertook to supervise the drilling operations. The oil company, under the contract, undertook to advance up to \$17,500 of the cost of the well, and to assign to White a 20 per cent. interest in the well for his services. White resumed operations, and in the course thereof rented from the plaintiff certain drilling equipment and purchased certain supplies which are the basis of the mechanic's lien thereafter filed and now sought to be foreclosed. Both the owners and the Cascade Company posted and filed notices of nonresponsibility.

Judgment was entered against the defendant White for the rental of the equipment, a judgment having been secured against him in a former action for the materials, and against Cascade Oil Company for the materials and supplies. A lien was declared on the latter's leasehold interest in the real property for these materials and supplies. It was further decreed that plaintiff had no lien upon the interest of the defendants Hasson for either rental or materials. Plaintiff appeals from those portions of the judgment denying its claim of lien for the rental of equipment against Cascade Oil Company and denying its claim of lien against the owners, the defendants Hasson, for both rental and materials. The defendant Cascade Oil Company appeals

from that part of the judgment giving a personal judgment against it for the value of the materials and supplies.

[1, 2] Under the amendment of 1911 to section 1183 of the Code of Civil Procedure (St. 1911, p. 1313), persons furnishing implements and appliances contributing to the drilling of a well have a lien for the value of the use of such appliances. It is true that prior to the amendment a claim of lien based upon rental of equipment to be used in construction could not be sustained either as a claim for labor or for materials. *Wood, Curtis & Co. v. El Dorado Lumber Co.*, 153 Cal. 230, 94 P. 877, 16 L. R. A. (N. S.) 585, 126 Am. St. Rep. 80, 15 Ann. Cas. 382. The amendment granting a lien to persons other than those expressly mentioned in section 15, article 20, of the Constitution is clearly within the constitutional powers of the Legislature. *Mendenhall v. Gray*, 167 Cal. 233, 139 P. 67. The lien, therefore, should have been decreed for the rental of the tools, equipment, and appliances furnished by plaintiff as against the leasehold interest of the Cascade Oil Company and it should also have been allowed against the land unless the owners' notice of nonresponsibility was sufficient.

Without passing on the question of whether the owners were charged with knowledge of the work at a date more than ten days prior to the filing of their notice, that part of the judgment denying the plaintiff its lien against the fee for both rental and materials must be reversed. There was no proper proof of posting by the owners of notice of nonresponsibility. The recorded copy of this notice, with an attached verification and an affidavit of posting, was received in evidence over plaintiff's objection. There was no other evidence produced to show the date when the owners first gained knowledge of the commencement of the work, to prove the fact of such posting, or the date thereof.

[3] A strict construction of section 1192 of the Code of Civil Procedure, whereby an owner may relieve himself from lien liability for improvements on his property, necessarily follows the adopted rule of liberal construction of section 1183 and hence he must show that he has fully complied with all of the requirements of section 1192. *Hammond Lumber Company v. Goldberg*, 125 Cal. App. 120, 13 P. (2d) 814. He must prove, among other things, that his written notice was posted in some conspicuous place upon the property within ten days after he obtained knowledge of the construction. Section 2009 of the Code of Civ-

il Procedure has no application to the proof of facts which are directly in controversy in an action. Its provisions apply only to matters of procedure, matters collateral or incidental to the action, but have no relation to the proof of facts the existence of which is made an issue of the case. *Lacrabere v. Wise*, 141 Cal. 554, 75 P. 185.

[4] The Cascade Oil Company's appeal from that portion of the judgment fixing personal liability upon it for the materials furnished cannot be sustained. There is sufficient evidence to support the finding that White acted as the agent of the oil company in the purchase of these supplies and hence the finding of the trial court is conclusive. We find no support in the record for the argument that plaintiff, knowing that it was dealing with White as the agent of the oil company, elected to hold the agent rather than the principal.

Those portions of the judgment denying plaintiff its claim of lien against the Cascade Oil Company for the value of the use of the equipment rented and denying its claim of lien against the interest of the defendants Hasson for both rental and materials is reversed. The judgment is otherwise affirmed.

We concur: BARNARD, P. J.; MARKS, J.



4 Cal.App.2d 390

UNRUH v. PIEDMONT HIGH SCHOOL
DIST. et al.
Civ. 9478.

District Court of Appeal, First District,
Division 2, California.
Feb. 5, 1935.

Rehearing Denied March 7, 1935.
Hearing Denied by Supreme Court
April 5, 1935.

I. Schools and school districts — 141(6)

Vocal music teacher dismissed on discontinuance of vocal branch of music department could not obtain reinstatement by writ of mandate on ground that under statute authorizing dismissal of teacher connected with "particular kind of service" discontinued, vocal music was not "particular kind of service" which could be distinguished from instrumental music which was continued and that therefore last teacher engaged in music department should have been first to be discharged (School Code, §§ 5.710, 5.711).

This was so, since determination that vocal music was "particular kind of service" under School Code, § 5.710, authorizing dismissal of teacher connected with particular kind of service discontinued, involved exercise of administrative function of school board which could be controlled by writ of mandate only on showing that board's action was arbitrary or capricious, or that action demanded by teacher was specially enjoined on the board by law and could not be controlled on mere showing of difference of opinion.

2. Schools and school districts ⇨141(4)

Vocal music teacher who served as head of music department only during first, second, and fourth years of his employment held not entitled to tenure as head of department but only as teacher of vocal music, so that discontinuance of vocal branch of music department justified teacher's dismissal (School Code, § 5.500 as added by St. 1931, p. 1394, and § 5.710).

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Mandamus proceeding by David P. Unruh against the Piedmont High School District, County of Alameda, and the Board of Education of the City of Piedmont, County of Alameda, and others. From a judgment denying a writ of mandate, the plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

William T. Paullin, of Oakland, and Albert A. Axelrod, of San Francisco, for appellant.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Agnes R. Polsdorfer and T. A. Westphal, Deputy Dist. Attys., all of Oakland, for respondents.

NOURSE, Presiding Justice.

This is an appeal from a judgment denying plaintiff a writ of mandate to compel the defendants to reinstate him as a permanent teacher in the Piedmont High School.

David P. Unruh was appointed by the Piedmont High School District in May, 1928, to serve as a teacher of music and was given the title of "head of the music department." During the school year 1928-1929, his first year of employment, he was the only instructor in the music department and he then taught both instrumental and vocal music. During the next three years he taught vocal music only, but retained the title of music head for the second and fourth years of his

teaching. On May 10, 1932, appellant received notice of honorable dismissal from the board of education with a statement that the vocal branch of the music department was being discontinued at the high school. He received a second precautionary dismissal prior to May 15, 1933. Appellant held a secondary life certificate which entitled him to teach music in all public schools. During the latter three years the school had employed other teachers to teach instrumental music and at the time of plaintiff's dismissal a probationary teacher was continued in this capacity. Since plaintiff was qualified to teach in this branch and was a permanent teacher, and since the music department, of which he was the head, was continued, he contends that he should have been retained instead of this other teacher.

Section 5.710 of the School Code provides that if a "particular kind of service" is discontinued in a school, the board may dismiss the employee connected with that service. The question here is whether or not vocal music, which was taught by plaintiff, is a "particular kind of service" to be distinguished from instrumental music which was continued in the school. Plaintiff claims that the two types cannot be divided and, since the reason for dismissal was "financial stringencies" and the fact that there were only one-third as many pupils in his classes as were required to make a full-time teaching position, he comes under section 5.711 of the School Code, which provides that if an employee is to be dismissed on account of a decrease in the number of pupils attending the school, the last person engaged shall be the first discharged. But respondents point out that there was no evidence of a decrease in the enrollment in the vocal music department or of the number of pupils attending the high school, but that the order was based upon a resolution discontinuing that particular branch of instruction.

There is dispute as to the meaning of the title "head of the music department." Respondents state that it was merely nominal, while appellant argues to the contrary, since he received \$700 a year more salary than a teacher would receive. Appellant cites *Cullen v. Board of Education*, 126 Cal. App. 510, 15 P.(2d) 227, 16 P.(2d) 272, and *Anderson v. Board of Education*, 126 Cal. App. 514, 15 P.(2d) 774, 16 P.(2d) 272, in an attempt to prove that his position as "head of the music department" cannot be taken away while the music department is continued. But respondents cite 5.502 of the School Code, as added by St. 1931, p. 1395, which provides that, un-

less the city charter provides otherwise (as in the above cases), teachers' tenure does not apply to supervisory positions but only to work as a classroom teacher. This fact renders the cases cited inapplicable here. Respondents further argue that, since appellant held this title only during the first, second, and fourth years of his employment, he was not employed for three consecutive years in this capacity and therefore was not entitled to tenure except as a teacher of vocal music.

The power of the respondents to act in cases of this kind is found in section 5.710 of the School Code, where it is provided that "whenever it becomes necessary to decrease the number of permanent employees in a school district on account of a decrease in the number of pupils attending the schools of such district, or on account of the discontinuance of a particular kind of service in such district, the governing board may dismiss such employee at the close of the school year." Section 5.711 provides: "If the dismissal of such employee shall become necessary on account of the decrease in the number of pupils attending the schools of the district, such employee so dismissed shall be the last person engaged in the type of work so discontinued."

[1] It will be seen that the dismissal of the last person engaged is required only when a dismissal is made necessary on account of a decrease in the number of pupils attending the school. Here the dismissal was made on account of the "discontinuance of a particular kind of service." Preceding the order of dismissal, the school board determined that the "particular kind of service" performed by the appellant should be discontinued and that the appellant was performing that kind of service and that only. This is a determination of an essential issue of fact which is primarily committed to the school board. Under our system of government, such administrative functions cannot be controlled by judicial writ upon a mere showing of a difference of opinion. Before mandamus will issue to compel the respondents to take action other than that recorded, the applicant must show that the action taken was arbitrary or capricious or that the action which he demands is specially enjoined upon respondents by law. Here the applicant has failed to make any showing other than that the respondents, presumably in good faith, have made a decision which he deems erroneous.

[2] But, on the merits of the complaint, the appellant is not entitled to the relief

sought because the right of tenure given him by section 5.500 of the School Code, as added by St. 1931, p. 1394, extends only to the "position or positions" in which he had been employed "for three consecutive school years." Assuming that the position of teacher of vocal music and the position of head of the music department are separate "positions" under the meaning of this section, it is undisputed that appellant's only consecutive service was in the position of teacher of vocal music. Hence he has gained no right of tenure in the position of head of the department. If these are not separate positions, then the combination has been abolished under the express authority of section 5.710. All the evidence supports the contention of the respondents that the "particular kind of service" for which appellant had been employed for three consecutive school years was the teaching of vocal music and that, for reasons coming within the express authority of section 5.710, this particular service had been discontinued.

For these reasons, the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



4 Cal.App.2d 601

NEFF v. WRIGHT.

Civ. 1181.

District Court of Appeal, Fourth District,
California.

Feb. 15, 1935.

Appeal and error ⇨773(2)

Motion to dismiss appeal *held* required to be granted, where no briefs or record on appeal had been filed, and time within which record on appeal could be filed had expired.

Appeal from Superior Court, San Diego County; J. T. B. Warne, Judge.

Action by Maude Neff against Verne H. Wright. From the judgment, plaintiff appeals.

Appeal dismissed.

C. C. Pease and Charles H. Greene, both of San Diego, for appellant.

Stearns, Luce & Forward, of San Diego,
or respondent.

MARKS, Justice.

The certificate of the clerk of San Diego county discloses that judgment was rendered in favor of defendant on July 11, 1933; that notice of appeal was filed by plaintiff on August 31, 1933; that a bill of exceptions was settled and filed on November 14, 1933. No record on appeal or briefs have been filed in this court.

As the time in which appellant may file her record on appeal has long since expired, and as no such record has been filed, the motion to dismiss the appeal must be granted.

Appeal dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.



4 Cal.App.2d 442

**MUNICIPAL BOND CO. v. CITY OF
RIVERSIDE et al.
Civ. 1427.**

District Court of Appeal, Fourth District,
California.
Feb. 7, 1935.

Hearing Denied by Supreme Court
April 8, 1935.

1. Appeal and error ⇨694(1)

On appeal on judgment roll, trial court's findings of fact are binding.

2. Appeal and error ⇨802

Judgment vacating on bondholder's motion order dismissing city's appeal because bondholder, a party to the action, had not been notified of city's proposed dismissal of appeal in action against city treasurer and his surety *held* res judicata of contention that city was not trustee for holders of assessment bonds and could not maintain action against treasurer's surety on account of treasurer's alleged misappropriation of moneys paid him by owners of assessed property (St. 1911, p. 730, as amended).

3. Municipal corporations ⇨173(5)

City was trustee for holders of assessment bonds and could maintain action against city treasurer's surety for treasurer's alleged misappropriation of moneys paid to him by owners of assessed property, though money had never been paid into city's general fund, and city was not liable to bond-

holders, and did not know who they were, where moneys were paid to treasurer pursuant to statute and city charter, and charter also provided that treasurer should retain moneys and pay them to holders of assessment bonds (St. 1911, p. 730, as amended).

4. Municipal corporations ⇨123

A "municipal corporation" is, like any other corporation, a purely fictitious entity created by law and can act only through its officers and agents.

[Ed. Note.—For other definitions of "Municipal Corporation," see Words & Phrases.]

5. Municipal corporations ⇨173(5)

Moneys paid to city treasurer by owners of property assessed pursuant to statute and city charter *held* to have been in possession of city as regards city's right to maintain action against treasurer's surety for treasurer's alleged misappropriation of such moneys on theory that city was trustee for holders of assessment bonds (St. 1911, p. 730, as amended).

6. Municipal corporations ⇨173(5)

Holders of assessment bonds were not necessary parties to city's action against city treasurer's surety for treasurer's alleged misappropriation of moneys paid to him by owners of property assessed (St. 1911, p. 730, as amended).

Appeal from Superior Court, Riverside County; Benjamin F. Warmer, Judge.

Action by the Municipal Bond Company against City of Riverside, Cal., which filed a cross-complaint against H. N. Dunbar and the Maryland Casualty Company. From a judgment denying recovery by the City of Riverside on its cross-complaint, cross-complainant appeals.

Reversed.

See, also, 30 P.(2d) 614.

Eugene Best, of Riverside, for appellant and respondent City of Riverside.

George W. Crouch and Roscoe R. Hess, both of Los Angeles, for appellant and respondent Municipal Bond Co.

W. C. Smith and Everett H. Smith, both of Los Angeles, for respondent Maryland Casualty Co.

A. Heber Winder, of Riverside, and W. C. Smith, of Los Angeles, for respondent H. N. Dunbar.

Lawler & Degnan, Freston & Files, James A. McLaughlin, Clarence J. Walker, and John L. Rush, all of Los Angeles, amici curiæ.

JENNINGS, Justice.

This is an appeal by the city of Riverside from that portion of the judgment which denied recovery to the municipality on its cross-complaint filed in the action. The action was instituted by the plaintiff corporation, an owner and holder of bonds issued by the city treasurer under the 1911 Street Improvement Act (St. 1911, p. 730, as amended). Thereby the plaintiff sought to recover from the city, the city treasurer, and the surety on the treasurer's official bond the sum of \$2,758.93, which was alleged to have been paid to the said treasurer by the owners of property upon which assessments had been levied to pay the cost of street improvements and for which assessments bonds had been issued. It was further alleged that the city treasurer had misappropriated the aforesaid sum to his own use. The city of Riverside filed an answer whereby it denied liability to the plaintiff and a cross-complaint against its codefendants, the city treasurer and the surety on his official bond, wherein it sought, on behalf of the owners of bonds issued under the above-mentioned Street Improvement Act, to recover from these cross-defendants the sum of \$5,607.08 which was alleged to have been paid to the city treasurer by property owners in payment of coupons upon said bonds issued as aforesaid and in partial redemption of said bonds and appropriated by said cross-defendant to his own use. The trial court denied recovery to plaintiff from the city and from the surety on the city treasurer's official bond. It also denied recovery to the city of Riverside on its cross-complaint. From the judgment thus rendered, separate appeals were prosecuted by the plaintiff and by the city of Riverside. That portion of the judgment which denied recovery to plaintiff from the city and from the surety on the treasurer's bond was affirmed. *Municipal Bond Co. v. City of Riverside*, 138 Cal. App. 267, 32 P.(2d) 661. At the time plaintiff's appeal was presented, there was also submitted a motion by the plaintiff to vacate an order of this court dismissing the city's appeal, which order had been entered pursuant to a written stipulation entered into between the city attorney of the city of Riverside and the attorney representing the surety on the city treasurer's official bond providing that the city's appeal should be dismissed. Plaintiff's motion to set aside the order of dismissal was granted, the order was vacated, and the remittitur which had issued upon the dismissal of the city's appeal was recalled. *Municipal Bond Co. v. City of Riverside*, supra.

[1] The single question which is presented on this appeal is whether or not the trial court correctly concluded that the city of Riverside was not entitled to recover from the city treasurer and his surety as trustee for the owners and holders of bonds issued by said city treasurer under the provisions of the 1911 Street Improvement Act as aforesaid. This appeal is on the judgment roll alone and this court is therefore bound by the findings of fact which the trial court made. There is here no dispute that the sum mentioned in the city's cross-complaint was paid to the city treasurer for the use and benefit of the bondholders and that the city treasurer did not account to the 1911 bond redemption fund or to the bondholders or to the city therefor. The city of Riverside, however, contends that the trial court's legal conclusion that the city was not entitled as a matter of law, to recover from the city treasurer and his surety, as trustee for the owners of bonds, is incorrect, and that therefore the portion of the judgment which denied recovery to the city on its cross-complaint must be reversed.

[2] We entertain the opinion that, in the solution of this problem, we are bound by our former decision vacating the order of this court dismissing the city's appeal. This action was taken on the motion of the plaintiff corporation. It was plaintiff's contention in support of the motion that as a bondowner it was vitally interested in the city's appeal and that it was not notified that the city proposed to dismiss the appeal under its stipulation with the city treasurer's surety. This contention prevailed. It is apparent that it must have been decided that the plaintiff was interested in the city's appeal, otherwise the court would not have been impelled to grant the motion. It is also apparent that the interest which the plaintiff had in the city's appeal was that it is one of the bondholders for whom the city sought to recover from the city treasurer and his surety on its cross-complaint. Examination of the opinion heretofore rendered by this court leaves no doubt that plaintiff's motion was granted and the order dismissing the city's appeal was vacated on the theory that the plaintiff, as one of the beneficiaries of the trust set up in the city's cross-complaint, was entitled to notice that the city proposed to abandon its appeal and that having received no notice, it was entitled to have the order of dismissal set aside as an order improvidently made.

[3] Irrespective of our opinion that we are here bound to adhere to our former decision

and assuming that the familiar doctrine of the law of the case is not applicable to the present appeal, we are nevertheless convinced that the trial court erroneously concluded that the city of Riverside was not a trustee for the bondholders of funds which the court had found were paid to the city treasurer upon bonds issued by said treasurer under the provisions of the 1911 Street Improvement Act "for the use and benefit of the various holders and owners thereof," and that the city is not therefore entitled to recover against the city treasurer and his surety on its cross-complaint.

The chief contentions of the respondent surety company on this appeal are that the city is exempted from liability to the bondholders by the provisions of the 1911 Street Improvement Act, and that, as the trial court specifically found that the money paid to the city treasurer by the property owners never found its way into the general fund of the city, the city never had possession of the money which the city treasurer misappropriated, and it may not therefore be declared to be a trustee of something which it never had.

With respect to the contention that the city is not liable to the bondholders it may be observed that this question was directly decided on the former appeal taken by the plaintiff from that portion of the judgment which denied recovery to plaintiff from the city of Riverside. It does not, however, follow therefrom that the city could not maintain an action against the treasurer and his surety as a trustee for the persons rightfully entitled to the money which was collected by the city treasurer and misappropriated by him.

[4] As to the contention that the city never received the money and therefore may not successfully urge its trusteeship of that which never came into its possession, it may be observed that the fact that the money never was paid into the general fund of the city is not conclusive of the question which is here presented. It is not disputed that the money was paid to an officer of the city in exact conformity with the provisions of the 1911 Street Improvement Act and that it was not contemplated by this statute that this particular money should be paid into the city's general fund. It is apparent, therefore, that an officer and agent of the municipality rightfully came into possession of this money by reason of the fact that he was such officer and, as such officer, retained it in his possession in exact conformity with law. A municipal corporation, like any other corporation, is a purely fictitious entity created by law.

It may act, therefore, only through its officers and agents. We think that it may not be successfully urged that the collection of money from property owners by an officer of the city in compliance with statutory mandate prevents the municipality from becoming a trustee of such money for the benefit of those persons who are entitled to receive it.

It must further be observed that section 253, article XIX, of the city charter of the city of Riverside, which was adopted in 1907 and remained in effect until July 1, 1929, specifically provided that "except as provided herein and unless otherwise provided by ordinance, the general law of the state of California relative to the improvement of, and the work upon streets * * * and providing for the laying out, opening, extending, widening, straightening or closing up in whole or in part of any street * * *; and for providing a system of street improvement bonds to represent certain assessments for the cost of street work and improvements within municipalities, and to provide for the payment of such bonds * * *, now in force, or which may hereafter be adopted by the legislature of this state, is hereby made a part of this charter, and shall govern the council in such matters." The above-quoted language is practically identical with that which appears in section 228 of article XIX of the city charter of the city of Riverside which was adopted in 1929 and which became operative on July 1 of that year. At all times material to the present inquiry, therefore, the 1911 Street Improvement Act was a part of the organic law of the municipality. We do not understand that it is intimated or contended that the city of Riverside had, by ordinance, provided for any different plan or scheme for street improvements for whose payment the bonds mentioned in the present action were issued than the plan which is provided by general law. Certainly, so far as here appears, the street improvements which caused the issuance of the bonds were accomplished under the provisions of the 1911 Street Improvement Act and we are entitled to assume that no other plan for the street improvements had been provided by ordinance and that the city council properly proceeded in accordance with the 1911 act.

[5] The situation therefore was that the money which was paid to the city treasurer by property owners whose property was affected by the street improvements was paid to such officer in accordance with the city charter. The safe-keeping and proper payment of the money by the city treasurer to the bondholders was also provided for by the

charter. The city having thus provided by its organic law that the money which the property owners should pay on the bonds should be paid to a designated officer of the city and having further provided that this officer should not deposit this money in the general fund of the municipality but should retain it in a special fund from which he should make payment to the bondholders, the possession of such money was legally in the city. This was the manner in which the city had elected to hold possession of the money. Conceivably, the city might have adopted a different scheme and might have provided, for instance, that the money should be paid into the city's general fund, from which it should be disbursed to the bondholders. The city, however, elected that its designated officer should retain physical possession of the money and should make payments therefrom to the bondholders. Under these circumstances, the possession of the money was in the city through its regularly constituted and specifically designated agent.

[6] Respondent Maryland Casualty Company contends that the fact found by the trial court that "said bonds were sold to and are now owned and held by various and sundry purchasers, the names of whom are not known and cannot be proven" renders it impossible that the city could have been the trustee for the bondholders. The contention is not persuasive. It is a matter of no concern to the surety on the official bond of the city treasurer that the names of the bondholders are not known. The bondholders were not necessary parties to the city's cause of action on its cross-complaint. *City of Oakland v. De Guarda*, 95 Cal. App. 270, 287, 272 P. 779, 273 P. 819. It may be that not all of the bondholders who are rightfully entitled to the money collected by the city treasurer will ever appear. It may develop that, if the money is recovered, a portion of it will escheat to the state. This cannot affect the obligation of the surety under its bond. The fact that the bondholders are not all identified and that some of them may never appear to claim the money which they are entitled to receive cannot afford an insuperable obstacle to the city's trusteeship of the money. Identity of the beneficiaries is not a necessary element of the problem. The question is whether the city can be a trustee for the bondholders generally and not whether it can be a trustee only for those bondholders who are known and named.

It is our conclusion that the city of Riverside was entitled to bring the action alleged

in its cross-complaint as trustee for the bondholders and that the trial court's conclusion of law that the municipality was not a trustee for the bondholders is incorrect.

That portion of the judgment from which this appeal has been prosecuted is therefore reversed.

We concur: BARNARD, P. J.; MARKS, J.



4 Cal.App.2d 461

STRAUS v. STRAUS.*

Civ. 9071.

District Court of Appeal, Second District,
Division 2, California.
Feb. 8, 1935.

As Modified on Denial of Rehearing
March 6, 1935.

Hearing Denied by Supreme Court
April 8, 1935.

1. Divorce ⇨331

Action may be maintained on foreign judgment of divorce for alimony due thereunder.

2. Courts ⇨120

Action on foreign judgment for alimony due thereunder amounting to \$375 held properly filed in superior court rather than in municipal court (Code Civ. Proc. § 1913).

3. Costs ⇨137

Nonresident plaintiff's failure to file bond securing costs demanded on afternoon of day before trial and court's overruling of defendant's objection to proceeding without bond held not to have deprived court of jurisdiction (Code Civ. Proc. § 1036).

4. Continuance ⇨11

Under statute providing for giving of cost bonds by nonresident plaintiffs, a defendant may not cause a continuance without good cause shown (Code Civ. Proc. § 1036).

5. Costs ⇨112(1)

Demand for cost bond of nonresident plaintiff must be timely (Code Civ. Proc. § 1036).

6. Costs ⇨112(1)

In action on foreign judgment of divorce for alimony due thereunder, denial of defendant's demand for bond securing costs held not error where demand was not made until afternoon of day before trial, and there was no effectual denial of nonpayment of alimony in excess of amount required for a cost bond or request for dismissal of action (Code Civ. Proc. §§ 1036, 1037).

7. Divorce ⇨326

Foreign judgment of divorce restraining guilty party from remarrying any person other than former wife procuring judgment except by court's permission is unenforceable in California.

8. Pleading ⇨304

Where plaintiff's attorney verified complaint alleging that specific amount of alimony was due under foreign judgment and unpaid, verification by resident defendant's attorney of statement that he had no information or belief on the subject and therefore denied the allegation *held* to have raised no issue requiring proof by plaintiff.

9. Judgment ⇨21

Judgment rendered on foreign judgment of divorce in action for alimony due thereunder *held* not invalid for indefiniteness.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Louise B. Straus against Leopold R. Straus. From a judgment for plaintiff, defendant appeals.

Modified and affirmed.

Harry J. Miller, of Los Angeles, for appellant.

Goodman, Bachrack & Brownstone, of Los Angeles (Herman A. Bachrack, of Los Angeles, of counsel), for respondent.

SCOTT, Justice pro tem.

Plaintiff obtained judgment against her husband, defendant, in the state of New York, by the terms of which the marriage bonds were dissolved and defendant was ordered to pay alimony to her. Defendant came to this state and plaintiff brought suit against him here to establish said foreign judgment obtained in New York as a judgment in this state, for the purpose of enforcing it as a continuing judgment for payment of alimony. Judgment was rendered for plaintiff and \$375 was found to be due up to that date. Defendant appeals.

[1, 2] Such an action is properly maintainable in this state, and contrary to appellant's contention was properly filed in superior court rather than in municipal court, although the accrued alimony at the time of judgment was in the sum above noted. *Creager v. Superior Court*, 126 Cal. App. 280, 14 P.(2d) 552; *Code Civ. Proc.* § 1913.

[3, 4] On the afternoon of the day before the case was tried defendant demanded security

for costs of plaintiff as a nonresident, under section 1036 of the Code of Civil Procedure. No bond was filed and the next day defendant's objection to proceeding for that reason was overruled. He now contends that the trial court was without jurisdiction because the bond was not filed. The filing of such a bond is not a prerequisite to the trial court's retaining jurisdiction (*Carter v. Superior Court*, 176 Cal. 752, 169 P. 667); and when the complaining party waits until the afternoon before the trial before demanding security for costs, it would seem that he has waived his right to make such demand, in the absence of some affirmative showing which would excuse the delay. A defendant has no right under the section cited to cause "a continuance of the trial, or delay the proceedings, or interfere with the business of the court" without good cause shown. *Sciutti v. Union Pacific Coal Co.*, 30 Utah, 462, 85 P. 1011, 1012, 8 Ann. Cas. 942; see, also, 8 A. L. R. 1517, and cases cited.

[5] This case is to be distinguished from *Gadette v. Recorder's Court*, 53 Cal. App. 72, 199 P. 817, and *Classroom Teacher, Inc., v. Superior Court*, 129 Cal. App. 261, 18 P.(2d) 746, in which the demand for security was filed when a demurrer was interposed, and from *Meade County Bank v. Bailey*, 137 Cal. 447, 70 P. 297, in which the demand was made on the day defendant first appeared in the action. The court in *Wall v. Hunter*, 57 Cal. App. 759, 207 P. 934, sustained the action of the trial court in dismissing the case when plaintiff had failed to file a bond within thirty days after demand (*Code Civ. Proc.* § 1037, then in effect), and held that such demand need not be made before demurrer or answer. From the language of *Shell Oil Co. v. Superior Court* (Cal. App.) 37 P.(2d) 1078, it appears that motion for such a bond should be "timely" if defendant's right to one is to be asserted, although it may be made after answer is filed.

[6] Here the trial court was presented with a demand by defense counsel on behalf of his client for such security for costs on the day before the trial, although statutory notice had been given of trial date. It was apparent from the pleadings that plaintiff had obtained in the state which was then the residence of both parties an uncontested divorce on ground of adultery, including an award of alimony which was reduced on August 1, 1932, to make it more advantageous to defendant. This case was filed November 2, 1932. Since defendant had evaded payment to plaintiff

of a sum of money due her under the foreign court's order, in excess of the amount required for a cost bond, and presumably had it in his possession at the time such demand for security for costs was made; and since defendant was not present at the trial except by his counsel when the protest was made against proceeding without security for costs, we are unable to say that the action of the trial court was arbitrary or that its implied finding that defendant had waived his right to such security was incorrect.

No request for dismissal under section 1037, Code of Civil Procedure, was made after objection to proceeding with the trial was overruled, or at any other time.

[7] Appellant directs attention to a portion of the judgment which after dissolving the bonds of matrimony, decrees "that the plaintiff be freed from the obligations thereof, and that plaintiff be permitted to marry again but the defendant be forbidden to marry any person other than the plaintiff during the lifetime of plaintiff, except by express permission of the court," then awards plaintiff alimony, declares that the judgment is interlocutory, but shall become final as of course three months after entry, and repeats the injunction above quoted. He declares that such a provision against remarriage is against public policy. Assuming but not deciding that the trial court correctly held that it was not against public policy, the provision is nevertheless conceded to be ineffectual and unenforceable in this state, and the judgment as entered in the California court should be amended so as to exclude that portion. *People v. Woodley*, 22 Cal. App. 674, 136 P. 312; 5 Cal. Jur. 446; *Mohn v. Tingley*, 191 Cal. 470, 476, 217 P. 733.

[8] Appellant complains of finding No. VI to the effect that alimony was due plaintiff in the sum of \$375, being for five months at \$75 per month, and asserts that it lacks evidentiary support. Although no evidence was introduced on this point, plaintiff's complaint, verified by her attorney, pleaded the obligation in positive terms. The answer of defendant, residing in this state, verified by his counsel, responded to this allegation with a statement that he had no information or belief on the subject and therefore denied it. Such an answer in this case was no denial but was tantamount to an admission, and raised no issue upon which testimony was required. *Weill & Co. v. Crittenden*, 139 Cal. 488, 73 P. 238; *Hall v. James*, 79 Cal. App.

433, 436, 249 P. 876; *Loveland v. Garner*, 74 Cal. 298, 15 P. 844.

[9] It is finally urged that the judgment herein is invalid because of indefiniteness. It appears, on the contrary, to be clear and explicit and to accord with the terms of the judgment sustained in *Creager v. Superior Court*, supra.

To conform to the opinion above expressed, the judgment is modified by adding the following language at the conclusion of the body of the judgment: "It is further decreed that the provisions of the said foreign judgment hereby established, restricting the remarriage of defendant, are invalid and without force or effect in this state." As so amended, the judgment is affirmed, respondent to recover her costs on appeal.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 356
**THOMAS v. SUPERIOR COURT IN AND
 FOR BUTTE COUNTY et al.**
 Civ. 5300.

District Court of Appeal, Third District,
 California.

Feb. 2, 1935.

Rehearing Denied March 4, 1935.

Hearing Denied by Supreme Court
 April 1, 1935.

1. Mandamus ☞26

Writ of "mandate" is not a writ of error and may not be employed to compel court to decide in any particular way, but will lie only when court erroneously refuses to accept jurisdiction (Code Civ. Proc. § 1085).

[Ed. Note.—For other definitions of "Mandate," see Words & Phrases.]

2. Mandamus ☞26

Mandamus held not to lie to compel superior court to hear and determine order to show cause why respondent should not be punished for contempt for failure to pay alimony where court had assumed jurisdiction and had previously entered such order and on hearing dismissed it on ground that there was no order requiring respondent to pay alimony (Code Civ. Proc. § 1085).

Petition for writ of mandate by Suzette Thomas against the Superior Court in and for Butte County and Hon. Warren Steele, Presiding Judge thereof.

Alternative writ discharged.

William Ellis Lady, of Los Angeles, for petitioner.

Horowitz & McCloskey, of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner seeks by this writ of mandate to compel respondents to hear and determine an order to show cause why one named therein should not be punished for contempt.

It is alleged in the petition that Clyde Thomas and Suzette Thomas were husband and wife; that an action for divorce was filed and defendant therein, Clyde Thomas, failing to appear, his default was duly entered and an interlocutory decree of divorce obtained. In this decree it was ordered "that defendant pay to plaintiff the sum of fifty (\$50.00) dollars per month as alimony for the support and maintenance of said plaintiff until such time as plaintiff may re-marry." In due time a final decree was entered, containing a like provision, but with the following added, "in accordance with property settlement entered into between plaintiff and defendant under date of September 12, 1928." For some time and until after the entry of the final decree, the defendant made the specified payments but subsequently became delinquent in a considerable amount, and there was then issued an order to show cause why Clyde Thomas should not be punished for contempt of court for his failure to make the payments as provided in the interlocutory decree of divorce.

The order to show cause was set and a hearing had thereon in the superior court of the state of California, in and for the county of Butte, the Honorable Warren Steele, a judge thereof, one of the respondents herein, presiding. Evidence was received and the cause argued and submitted, whereupon respondent judge dismissed the citation upon the ground that there was no order requiring Clyde Thomas to pay the petitioner any sum as alimony.

Upon the petition containing these allegations, petitioner prayed that a peremptory writ of mandate issue to respondents named, commanding them to hear and determine the order to show cause, and in particular to determine whether or not Clyde Thomas had

the ability to make the payments specified in the interlocutory decree, and, after such determination, to make and enter such appropriate order as to said respondents may seem meet and proper.

To the petition, respondents have interposed a general demurrer and an answer. We believe, however, the matter may be disposed of upon the demurrer, and we will therefore examine the petition to determine if it contains facts sufficient to state a cause of action, or to justify the issuance of a writ of mandate.

Mandate is one of the extraordinary writs and "may be issued by any court, except a justice's or police court, to any inferior tribunal, * * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station. * * *" Code Civ. Proc. § 1085.

The gist of the petition for the writ is that respondents refuse to hear and determine the order to show cause, and in particular that respondents refuse to determine whether or not defendant has the ability to comply with the interlocutory decree of divorce, and refuse to make an appropriate order.

The allegations in the petition, however, set forth that " * * * on or about the 16th day of April, 1934, a hearing was had on said order to show cause before said Superior Court of the State of California in and for the County of Butte, the Honorable Warren Steele, Judge, presiding, at which petitioner was present together with her counsel, and the said Clyde Thomas was absent but represented by his counsel; that at said hearing petitioner herein, as plaintiff therein, gave testimony and offered evidence showing that the said Clyde Thomas had the ability to comply with said interlocutory decree. * * *" "That upon the completion of said hearing, said court, the Honorable Warren Steele, Judge presiding, took said matter under consideration, and thereafter entered an order to the effect that there was in force and effect no order requiring said Clyde Thomas * * * to pay to petitioner * * * any sum * * * by way of alimony, and for that reason * * * found defendant not in contempt and discharged said order to show cause."

It therefore appears that a hearing has already been had upon the order to show cause.

That the court had jurisdiction of the order to show cause there is no question, and it proceeded to hear testimony and receive evidence and ultimately entered an order.

[1] It is elementary that a writ of mandate is not a writ of error. "The only duty of the court was to try the action and to render judgment. This it has done. If any errors have been committed during the progress of the trial, they cannot be corrected by means of the writ of mandate." *Short v. Superior Court*, 94 Cal. App. 664, 271 P. 783, 784. Nor may mandate be employed to compel the court to decide in any particular way. "It is, of course, to be understood that such a writ will only issue where there was an entire absence of any showing constituting good cause presented in the superior court upon the hearing of the motion to dismiss. If the evidence presented on that subject was conflicting or on the conceded facts in evidence a reasonable deduction therefrom would support the action of the trial court in denying the motion, a writ of mandate would be denied." *Ex parte Ford*, 160 Cal. 334, 116 P. 757, 763, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267.

A court having the matter properly before it, has, as is often said, jurisdiction to decide either erroneously or correctly. It is only when a court erroneously refuses to accept jurisdiction that mandate will lie. *Hayward v. Superior Court*, 130 Cal. App. 607, 20 P.(2d) 348.

The case of *Brock v. Superior Court*, 119 Cal. App. 5, 5 P.(2d) 659, is quite similar to the case at bar, and the court there said: "It thus appears that the court did not deny its jurisdiction to pass upon the application. It did pass upon and determine said application, but refused the requested allowance, because the court was of the opinion that it did not have authority to make such allowance to a child not residing in this state and not present in this state, in an action to compel a father to support his child. If the court erred in this conclusion (which we do not decide), it was only an error made by the court in the exercise of its jurisdiction. It was not a refusal to act upon the merits of the matter presented. The petition for writ of mandate is denied."

[2] Petitioner in her brief states: "We are not seeking a second hearing, but all we ask is that we be given a hearing as to whether or not the defendant in the divorce action has been guilty of contempt in failing to comply with an order of the Superior Court of which he had full and complete knowledge. All the court has done is to wrongfully divest itself of jurisdiction and under those circumstances, mandate is the correct remedy to cure the error." It seems to be petitioner's

theory that by entering an order discharging the order to show cause in the contempt proceeding, the trial court divested itself of jurisdiction, or, in other words, refused to accept jurisdiction. Of course, that is not correct. The first thing the trial court had to look for was a valid order for the payment of alimony. This, respondent failed to find, and ruled accordingly. Whether or not the court was correct in its conclusion is not for us to determine.

It is only something that the respondents have failed to do, demanded by law under the pleadings and evidence that can be required of them, and only where a court has wrongfully divested itself of jurisdiction of a cause, is mandate the correct remedy to cure the error. *Washington, etc., Co. v. Superior Court*, 129 Cal. App. 430, 18 P.(2d) 713, and then the mandate is to compel the performance of a further duty to act, and not a coercion as to the manner or result of the action. Here, if respondents had refused to issue a citation upon a proper showing by initiatory affidavit, or having issued the citation, had refused to hear and decide the matter, mandamus would lie, but that is not the situation here presented where a hearing was actually had and an order made in conformity with the finding of the court.

If we are correct in holding that the respondents actually heard the testimony on the order to show cause, and upon that hearing entered an order, based upon certain grounds with which we are not concerned, that respondent therein was not guilty of contempt, it became unnecessary for the court to determine whether or not Thomas had the ability to comply with the interlocutory decree. The holding of the court was in effect that Thomas was not guilty of contempt, and no further findings are necessary or proper.

Respondents raise various other points against the sufficiency of the petition or the nature of the remedy; that it does not lie except where the petitioner has a clear legal right and the trial court a clear public duty to perform, which it refuses to perform, and then only when there is lacking a speedy and adequate remedy at law; and further that the petition shows that as to a majority, if not all of the payments, the nonobligation of the defendant was res adjudicata, and that petitioner has an adequate remedy at law in that Thomas is bound to make the payments in accordance with the terms of a property settlement, and inasmuch as petitioner avers that he has the ability to pay, a writ of execution would presumably be satisfied.

However, we need not discuss these various points as we are convinced that respondent having acted upon the order to show cause, there is no field for the operation of the writ of mandate.

The demurrer is sustained and the alternative writ discharged.

We concur: THOMPSON, J.; PLUMMER, J.



4 Cal.App.2d 509

WALSH-COL CO. v. EMIG, Sheriff, et al.
Civ. 9537.

District Court of Appeal, First District,
Division 2, California.
Feb. 13, 1935.

1. Sheriffs and constables ☞118

Undertaking for release of attachment held sufficient in both its original form and as altered by sheriff, so as to bar recovery of damages for his alleged negligence in accepting undertaking and releasing attached property (Code Civ. Proc. § 540).

The sheriff altered the original undertaking, which was that "if plaintiff shall recover judgment * * * against the defendants," the latter would redeliver attached property to proper officer for application to payment on judgment or, in default thereof, pay plaintiff full value of property, "not exceeding the amount of such judgment against such defendants," by inserting words, "or any of them," after words "defendants" and striking out provision for redelivery.

2. Alteration of Instruments ☞16

Not every alteration of written instrument will prevent recovery thereon.

3. Sheriffs and constables ☞137(1)

Complaint in action for injury caused by sheriff's alleged negligence in releasing attached property on insufficient undertaking as altered by him held insufficient, in absence of allegation that he was agent of plaintiff or any one for purpose of altering undertakings or consenting thereto; such facts not being presumed (Code Civ. Proc. § 540).

4. Alteration of Instruments ☞16

Recovery on altered written instrument does not depend on whether alteration was made before or after delivery of instrument.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by the Walsh-Col Company, a corporation, against William J. Emig, Sheriff of Santa Clara county, and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

L. F. Hobbs, of San Jose, for appellant.

Redman, Alexander & Bacon and George J. Zech, all of San Francisco, for respondent Columbia Casualty Co.

Fred L. Thomas, Dist. Atty., and Frank J. Waterhouse, Asst. Dist. Atty., both of San Jose, for respondent William J. Emig, sheriff.

STURTEVANT, Justice.

The plaintiff sued the defendant as sheriff and his bondsmen for injury caused it by the alleged negligence of the sheriff. The trial court sustained the defendants' demurrer to the plaintiff's second amended complaint, without leave to amend unless the amended pleading be presented in three days. At the end of seventeen days, no amended pleading having been filed, a judgment of dismissal was entered. From that judgment the plaintiff has appealed.

The point involved is whether the defendant sheriff acted negligently in accepting from the judgment debtors a certain undertaking and releasing attached property under Code of Civil Procedure, § 540. The plaintiff's complaint is very full and complete with two material exceptions, which will presently be noted. The material allegations involved are as follows: On October 21, 1931, the plaintiff commenced an action against W. E. Cochran and others to recover \$932.28, the price of merchandise sold and delivered. It obtained a writ of attachment and caused it to be served on the Broadway Grocery. Two days later, Charles F. Harding, Esq., the attorney for the defendants W. E. Cochran and others, appeared at the office of the sheriff, the defendant in this action, and under the provisions of section 540 of the Code of Civil Procedure he tendered an undertaking and asked that the property so attached be released. The undertaking so tendered was not satisfactory to the sheriff. He, or Mr. Harding, made certain insertions and struck out certain words, and Mr. Harding initialed and dated the changes. As so changed, the document was in words and figures as follows:

"Whereas, the plaintiff in the above-entitled cause has commenced an action in the afore

said court against the above-named defendants for the recovery of nine hundred thirty-two and 28/100 dollars (932.28) and costs of suit;

"And whereas, Wm. J. Emig, sheriff of the county of Santa Clara, state of California, has attached and now holds certain property of defendant, W. S. Stephenson, under the authority of a writ of attachment issued in said action;

"And whereas, the said defendant W. S. Stephenson, is desirous of securing the release of said property from the operation of the attachment;

"Now therefore, we, the undersigned, residents of and householders in the said state of California, in consideration of the premises, and of the release from said attachment of the property attached, do hereby jointly and severally undertake, in the sum of nine hundred and fifty dollars (\$950), and promise to the effect that in case the said plaintiff shall recover judgment in said action against the defendants *or any of them* such defendants will, on demand, ~~redeliver the attached property so released to the proper officer to be applied to the payment on any judgment in such action against said defendant, or in default thereof,~~ that such defendants and the undersigned will on demand pay to the plaintiff the full value of the property so released, not exceeding the amount of such judgment against such defendants *or any of them* and not exceeding the said sum of Nine hundred and fifty dollars (\$950).

"S. Barloggi

"Chas. Pfau."

The words inserted we have italicized. The words struck out we have so indicated. There is no allegation that this plaintiff was present or had any knowledge of the changes; nor that it authorized any part or portion of the changes. In its changed and altered form the sheriff accepted the undertaking and released the property theretofore attached. Continuing, the plaintiff alleges that in its action against W. E. Cochran et al., it obtained judgment for the full amount sued for, that it took out execution and collected \$138.75 and no more; that it then filed a suit on the undertaking, but that judgment was rendered against it in the trial court because the undertaking had been altered, etc. It is fur-

ther alleged that said last-mentioned judgment has become final.

[1-4] The plaintiff asserts that the defendant sheriff negligently released the attached property upon an insufficient undertaking. If he did, then the complaint would be sufficient and the demurrer should have been overruled. But the defendants reply that the undertaking in its original form and also in its altered form was entirely sufficient. They cite and rely on *Central California Creditors' Ass'n v. Seeley*, 91 Cal. App. 327, 267 P. 138. The reply is complete. That case is directly in point. But in its reply brief the plaintiff attempts to distinguish that case from this. It asserts that the fact in the Seeley Case was that the undertaking in its original form was accepted by the sheriff, the property was released, and thereafter the alterations were made. To that reply we think there are two answers. In the first place the facts of that case, as stated by the plaintiff, do not appear on the face of that decision. In the second place we think the plaintiff is mistaken as to the rule of law applicable to the case. Not every alteration of a written instrument will prevent a recovery. 1 Cal. Jur. 1078. It was not alleged that the plaintiff altered the undertaking. It is argued, however, that the sheriff was, in certain aspects, the plaintiff's agent in levying the attachment and that his acts were the plaintiff's acts. That is too broad. It was not alleged that the sheriff was the agent of any one for the purpose of altering undertakings nor to give consent to such alterations. Such allegation was necessary because such facts will not be presumed. *California Savings, etc., Bank v. Wheeler*, 216 Cal. 742, 746, 747, 16 P. (2d) 737. Neither do the cases turn on whether the alteration was made before or after delivery. In *Humphreys v. Crane*, 5 Cal. 173, the allegation was that the note sued on was altered after delivery, but recovery was allowed. In *Union Oil Co. v. Mercantile Refining Co.*, 8 Cal. App. 768, 97 P. 919, the form of the instrument was altered before delivery, but recovery was allowed as on the original form of the bond. But in neither case was the alteration made by the plaintiff. Neither was it so made in the instant case.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

EXCHANGE SECURITIES CORPORATION

v. RAINEY, Superintendent of Banks.*

Civ. No. 8496.

District Court of Appeal, Second District,
Division 1, California.

Feb. 14, 1935.

Rehearing Denied March 14, 1935.

Hearing Denied by Supreme Court

April 15, 1935.

1. Banks and banking ⇨39

Bank organization committee and trustees of stock subscription fund acted as agents of subscribers, giving notes for amounts subscribed, in negotiating loans to pay cash for stock and pledging notes and stock as collateral under powers of attorney and pledge agreements executed by subscribers, so that bank was not liable for trustees' failure to return stock certificates or for repayment of money paid by subscribers in taking up notes.

2. Banks and banking ⇨22

Bank, issuing and delivering stock to subscribers paying money therefor, held not liable on its organizing committee's note to another bank for loan, secured by pledge of subscriber's notes and stock, as beneficiary of committee's activities and all rights and property acquired during promotion of bank's organization.

3. Banks and banking ⇨39

Bank, receiving money paid on stock subscription notes as another bank's agent for collection thereof, crediting amount to trustees of stock subscription fund and forwarding it to other bank in part payment of organization committee's note, secured by pledge of subscription notes, and subscribers' stock, as authorized by subscribers, held not bound to deliver stock to subscriber on payment therefor or return amount paid.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by the Exchange Securities Corporation, by substitution for J. H. Shreve, against Edward Rainey, by substitution for Will C. Wood, as State Superintendent of Banks. Judgment for defendant, and plaintiff appeals.

Affirmed.

Shreve, Abbey & Shreve, of San Diego, and D. P. Hatch, of Los Angeles, for appellant.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

PER CURIAM.

Plaintiff appeals from a judgment in favor of defendant in an action brought to establish a claim against the Pan American Bank of California, an insolvent banking corporation in process of liquidation by the superintendent of banks of the state of California. The following opinion, substantially as prepared by Judge Edwin F. Hahn (while acting as a justice pro tempore of this court, immediately before his retirement from the bench), is hereby adopted as the opinion of the court in this case:

The evidence, as presented in a voluminous record, presents a complicated situation arising out of the promotion and failure of this ill-fated banking institution. The evidence on several points is vague and unsatisfactory; thus increasing the difficulties encountered in our review of the case. In view of the conclusion at which we have arrived, we will attempt to give a recital only of such evidentiary matters as we deem necessary for an understanding of the grounds for our conclusion.

Early in 1926 a group of men, desirous of forming a state bank to enter the banking field in Los Angeles, organized themselves as the "Organization Committee of the Pan American Bank of California (organizing)." On September 9, 1926, this group designated, as trustees to collect and hold subscription funds to the stock of the "Pan American Bank of California (organizing)," F. W. Smith, Will E. Morris, H. B. Hening, and Harry M. Rubey. (For the purpose of brevity, these men will hereafter be referred to as the "trustees" to distinguish them from the larger organization committee which will be referred to as the "Committee.")

The proposed bank was to have an authorized capital of \$2,000,000 divided into 20,000 shares, and a surplus of \$1,000,000, to start with. To raise the required \$3,000,000 which, under the permit issued by the state superintendent of banks, was required to be paid in cash before the bank could open on December 30, 1926, as planned, stock was offered for subscription at \$150 per share. Of this sum \$100 was to go to capital and \$50 to surplus account. Among the subscribers were J. H. Shreve, who on July 8, 1926, subscribed for 50 shares, and F. D. Arrington and E. H. McMath, who on November 30, 1926, subscribed for 100 shares each. It is conceded that the Arrington and McMath subscriptions were made for J. H. Shreve, and that he was the real owner of their stock subscription rights. Plaintiff is the successor in interest

of all the Shreve, McMath, and Arrington rights. No cash was paid on these subscriptions, but 90-day notes were executed by each of the subscribers to the "Trustees" for the full amount of the subscription; that is, Shreve gave a note for \$5,000; McMath one note for \$5,000 and one for \$10,000, and Arrington two notes for like amounts. During the trial, a settlement as to J. H. Shreve subscription and stock was agreed to by stipulation, leaving alone for consideration the transactions relating to the McMath and Arrington subscriptions.

In due course, prior to December 30th, the full amount of the authorized 20,000 shares of stock was subscribed for. Indeed, it was later discovered that subscriptions for over \$49,000 of stock in excess of the authorized capital were taken. Of the authorized stock, subscribers paid in cash \$1,766,713. For the balance of the subscribed stock 90-day notes of the subscribers were taken payable to the trustees, with the understanding that these notes would be discounted or hypothecated by the committee so as to raise the full \$3,000,000, in cash which had to be paid in to the bank before it was authorized to open.

At the time subscriptions were made by those who gave their notes, they also executed irrevocable powers of attorney to the "Trustees" to transfer any stock to which the subscriber was entitled, general pledge agreements, giving to the "trustees" unlimited powers to pledge, sell, and use in any manner the "trustees" saw fit the note of the subscriber, and also any stock that might be issued on account of his subscription.

After discounting some of the subscribers' notes, the committee, in order to secure the full \$3,000,000 in cash by December 30, 1926, found it necessary to raise \$1,030,000. To secure this money, the committee negotiated loans for this amount from several banks, and private concerns. But two of these loans concern us: One of \$80,000 from the Capital National Bank of Sacramento and one of \$500,000 from the Chatham-Phoenix Bank of New York. These loans were made to the "committee," who as individuals signed and guaranteed the notes. For the \$80,000 loan there was pledged a certificate for 533 shares of Pan American Bank stock, made out in the names of the "trustees," and notes of stock subscribers in the total amount of \$80,000. For the \$500,000 note was pledged subscribers' notes totaling the full amount of \$500,000, and also a certificate of stock of the Pan American Bank made out in the name of J. H. Smith, one of the trustees, for 3,332 shares, being the total number of shares sub-

scribed for as represented by the pledged notes.

On December 3, 1926, interim subscription certificates were issued by the trustees for 100 shares each to McMath and Arrington, and later, the date not appearing, these certificates were canceled and the stock issued as part of the block represented by the certificate for 533 shares which was pledged with the Capital National Bank. It clearly appears that the McMath notes went to the Capital National Bank with others, as part of the collateral to the \$80,000 note. As to what was done with the Arrington notes, the evidence is in conflict. There is testimony that these notes were included in the collateral put up with the Capital National Bank. There is also evidence that they were retained by the committee until paid.

On June 15, 1927, the Capital National Bank forwarded to the Pan American Bank for collection the committee's \$80,000 note, on which at that time there was a balance remaining unpaid of \$59,990. With the note was also forwarded the collateral then held with the note, which included the certificate for 533 shares of bank stock. Pursuant to notices sent out by the Pan American Bank to McMath and Arrington requesting payment of their notes, on June 28, 1927, J. H. Shreve paid in full these notes, which were thereupon canceled and delivered to him. The money paid was by the bank deposited to the account of the "trustees" who were still engaged in collecting subscribers' notes, which funds were in turn paid by the trustees on account of the committee's notes then outstanding. It was the plan and practice of the trustees as subscribers paid their notes, and such subscribers' stock was released from the collateral pledged with the committee notes, to cause to be reissued certificates for the number of shares of stock the subscriber was entitled to, and delivered to him. However, when Shreve paid the McMath and Arrington notes, no certificates were reissued by the trustees to him, and no stock certificates were issued to him. Instead, at the request of Will E. Morris, who was one of the trustees, Shreve agreed to loan his stock to Morris, giving to him a letter which reads as follows: "Mr. F. W. Smith, president Pan American Bank of California, Los Angeles, California. Dear Sir: I have loaned 250 shares of the capital stock of the Pan American Bank of California to Mr. Will E. Morris, to use to assist in stabilizing the market for the stock. I am instructing the secretary of the bank to transfer this stock for you, as trustee for me, and you may pledge such stock

as collateral security in such manner and on such stock obligations as Mr. Morris may direct. Respectfully, J. H. Shreve."

Thereafter, upon the full payment by the trustees of the \$80,000 note to the Capital National Bank, the 533 shares of stock held as collateral were released to the trustees, who in turn caused it to be reissued in the proper amounts to subscribers whose notes to the trustees had been paid. None of this stock was issued to Shreve, as the "trustees" undoubtedly construed the written authorization given by him to Morris as relieving them of the necessity of making delivery of stock to him out of the 533 share block released by the Capital National Bank. At this time there was still remaining unpaid on the committee's note to the Chatham-Phoenix Bank \$400,000, with which 3,332 shares of stock was still held as collateral. The committee had an agreement for the release of a proportionate amount of this stock with each payment of \$50,000 on the note. Apparently the trustees intended to issue the McMath and Arrington shares out of the 3,332 shares when released by the Chatham-Phoenix Bank. A. B. Suppl. fol. 732. Due to the drop in the market price of the Pan American Bank stock, the Chatham-Phoenix Bank refused to release any of the collateral stock, although \$100,000 had been paid on the note. Subsequently, the date not appearing, the Chatham-Phoenix Bank foreclosed on the pledged stock to satisfy the balance remaining unpaid on the note, and the "trustees" found themselves short on stock necessary to deliver to subscribers for 66⅔% shares who had paid their subscription notes. Among the number who had so paid was J. H. Shreve, plaintiff's assignor.

In support of its appeal, appellant urges its right to a claim against the Pan American Bank for the money paid by Shreve because: (1) The money was actually paid to the bank by Shreve, whereupon the bank was liable for the delivery to him of the 200 shares of stock for which he made payment; (2) the bank became liable on the completion of its organization for the obligations of the committee in the matter of the stock subscriptions, and was therefore bound to make delivery of the subscribed stock when payment was made therefor; (3) that the ratification of the acts of the committee by the directors of the bank at their meeting on December 27, 1926, made the bank liable for the obligation of the "trustees" to deliver the 200 shares of stock to Shreve when the notes given therefor were paid.

[1] In reply, respondents contend that the "committee" and the "trustees," in financing the payment for the stock subscribed for by McMath and Arrington, were agents of the subscribers, and that in none of their acts in negotiating the loans or handling the stock after its original issue, and payment to the bank therefor, were the trustees or the committee acting as the agents of the bank.

Respondent's contention is well founded both in the evidence and the law. The activities of the "committee," and that includes the "trustees" who were a part of the committee, in negotiating the loans to pay in cash for the stock of subscribers who gave notes for their subscriptions, were clearly on behalf of, and for the benefit of, the stock subscribers who were unable to meet the cash payment requirements of the law. This method of financing the note subscriptions was understood by these subscribers, for, when they gave their notes, they also executed irrevocable powers of attorney and general pledge agreements to the "trustees," which clearly and specifically made the "trustees" their agents for the purpose of raising money to pay for their stock. It may be conceded, as argued by appellant, that there is no law that precluded the committee from taking subscribers' notes for stock subscriptions so long as the notes could be discounted or converted into the cash necessary to meet the requirements of the permit. But such right does not affect the situation with which we have to deal, for the reason the McMath and Arrington notes never were discounted or converted into cash by the "committee." The evidence justifies the inference that Shreve knew from the outset that the McMath and Arrington notes and stock were to be used as collateral just as they were, and he clothed the "trustees" through McMath and Arrington with authority as his agent to do the things which they did with their notes and stocks.

[2] Nor does the law that the bank when organized becomes the beneficiary of the activities of the committee and all of its benefits, rights, and property acquired in the course of the promotion of the corporation change the situation here involved; for under no theory can it be successfully maintained that the Pan American Bank became liable for the committee's notes to the Capital National Bank and the Chatham-Phoenix Bank. When the money was paid into the bank for stock and the stock was issued and delivered, by or on behalf of the bank, the obligations of the bank to the subscriber were fulfilled so far

as stock was concerned. From that time the stock was used under authority given by the subscriber for his use and benefit until he became entitled to have it returned to him from his agent to whom he had intrusted it.

[3] Appellant has cited and quoted from a number of cases in support of his theory that the bank was liable to deliver the stock to the subscriber when he paid for it. As an abstract proposition of law, a subscriber is entitled to delivery of the stock for which he makes payment. Here the evidence shows the certificates were issued and delivered to the agents of McMath and Arrington, who were duly authorized to receive them. Nor does appellant's theory that the bank became liable to Shreve to return the \$30,000 paid to it on the McMath and Arrington notes when it failed to deliver to him the stock for which the notes were originally given find support in either the facts or the law. The bank in receiving this money was acting as the agent of the Capital National Bank for the purpose of collecting the collateral notes as they became due; and the money so received was credited to the "trustees" and forwarded to the Capital National Bank in part payment of the \$80,000 note. Whether or not Shreve at the time he paid the money had a right to demand from the bank the 200 shares of stock for which the notes were given is not necessary for us to decide, because it appears, first, that he made no such demand; and, secondly, he executed and delivered a document to two members of the "trustees" which authorized them to use his stock as collateral to any loan they saw fit. Clearly the stock was not to be used as collateral to any borrowing by the bank. It is fair to assume that Shreve was familiar with the situation with respect to the committee's borrowings and with the fact that other members of the committee had permitted their stock for which they had paid in cash to be put up as collateral with the committee's \$500,000 note. It is a fair inference that it was his purpose to co-operate with the "trustees" as other members had in an effort to avoid action by the Chatham-Phoenix Bank on the \$500,000, which was then threatening. The Pan American Bank as a corporate entity had no obligation to the Chatham-Phoenix Bank, nor would it have had any right to guarantee, or support by pledging any of its securities, the obligation of the committee to that bank.

We have not extended this opinion with the citation of authorities or any discussion of

the cases cited in the briefs filed. In view of our conclusion that the "trustees" in possessing and handling the McMath and Arrington notes and stock were the agents of Shreve in handling and dealing with this stock, it requires no citation of authorities or discussion of legal principles to support the conclusion that the Pan American Bank was not liable for the failure of the trustees to return the certificates intrusted to them, or for repayment of the money paid in taking up their notes. Inasmuch as the facts as recited fully support the findings, the conclusions of law which necessarily follow cannot well be questioned.

In view of the conclusion arrived at, it becomes unnecessary to discuss other points dwelt on in the briefs.

The judgment is affirmed.

2 Cal.2d 312

**LISSE et al. v. LOCAL UNION NO. 31,
COOKS, WAITERS, and WAIT-
RESSES et al.
S. F. 14228.**

Supreme Court of California.
Jan. 29, 1935.

1. Injunction ⇨101(3)

Acts of pickets amounting to physical intimidation of employees and patrons of business should be enjoined.

2. Injunction ⇨101(3)

Physical intimidation of employees or patrons of business by pickets, warranting injunction, may be accomplished by obstruction and annoyance or insult and menacing attitude.

3. Injunction ⇨101(3)

Proprietors of restaurant held entitled to injunction to restrain intimidation of patrons and employees, where court found pickets in front of restaurant made grimaces and insulting gestures and waved newspapers containing headlines derogatory to restaurant.

The court found that pickets employed by the union danced around on sidewalk in front of the restaurant, pointing at the restaurant and the persons therein, made grimacing and insulting gestures to and at the restaurant employees, and advanced near the door and prominently displayed to patrons in the restaurant newspaper headlines derogatory to the restaurant. The papers were so held that headlines could be plainly read by persons passing along the sidewalk in front of the restaurant or entering or leaving restaurant. The court further found that, by reason of such acts of the pickets, many regular patrons and customers of the restaurant had ceased to patronize it.

4. Injunction ⇨101(1)

Trade union can carry on boycott both primary and secondary in connection with strike.

5. Injunction ⇨190

Injunction against picketing of nonunion restaurant should be limited to restraint against intimidating, threatening, molesting, or coercing proprietors, employees, or patrons.

In Bank.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Suit by P. M. Lisse and others against Local Union No. 31, Cooks, Waiters, and Waitresses, and others. Judgment for plaintiffs, and defendants appeal.

Modified and affirmed.

Prior opinion, 24 P.(2d) 833.

Walter M. Gleason, of San Francisco, and J. L. Royle, of Oakland, for appellants.

J. W. O'Neill, of Oakland, for respondents.

Brobeck, Phleger & Harrison and George O. Bahrs, all of San Francisco, amici curiae for Industrial Ass'n of San Francisco.

Henry B. Lister, of San Francisco, amicus curiae for Local Joint Executive Board of Hotel and Restaurant Employees and Beverage Dispensers' International Alliance.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, First Appellate District, Division 1. Upon further consideration, we are satisfied that the opinion of that court correctly determines the issues, and we adopt it as our own opinion. It reads as follows:

Plaintiffs own and operate a business in Oakland known as the Rainbow Café, wherein they manufacture and sell bakery products and serve meals to the public for profit; and as such owners they brought this action and obtained a judgment against the defendant labor union and some of its officers and members to restrain them from an alleged illegal interference with the operation of said business. From said judgment defendants appeal.

The findings upon which the judgment is based follow generally the allegations of the complaint, and the evidence is legally sufficient to support such findings. Among the facts found were the following: "That plaintiffs have conducted said business at said location continuously since 1924. That at all times up to the 8th day of October, 1929, plaintiff, in the conduct of said business, employed as cooks and waitresses, persons who were members of said defendant association.

That on October 8, 1929, said defendant association called a strike against plaintiffs and at said time all of said cooks and waitresses, members of defendant association, as aforesaid, left their work at plaintiffs' said place of business and ever since said date defendants have been and are now maintaining a boycott against plaintiffs' said business. That on the 11th day of October, 1929, defendants commenced to maintain and up to the time of the issuance of the temporary restraining order herein on November 27, 1929, did maintain, and, unless restrained by the court from so doing, will continue to maintain, pickets in front of and adjacent to and near plaintiffs' said place of business for the purpose of intimidating and causing the public to cease to patronize the said business of plaintiffs. That since said 11th day of October, 1929, up to the time of the issuance of said restraining order, as aforesaid, said pickets so stationed in front of and adjacent to and near plaintiffs' said place of business, as aforesaid displayed and waved in front of the people passing by or approaching said place of business, papers on which are printed in large type the following statements: 'RAINBOW CAFE NOW NONUNION'; 'IS ON OFFICIAL "WE DON'T PATRONIZE" LIST OF UNION LABOR'; 'IS RAINBOW CAFE VIOLATING LAW?' 'RAINBOW CAFE OWNER CHARGED WITH STATE EIGHT HOUR LAW VIOLATION'; 'RAINBOW CAFE FIGHT PROGRESSES.' That at the time of the commencement of this action, said pickets were displaying to and waving in front of the people passing by or approaching said place of business, papers on which are printed in large type the following statement: 'RAINBOW CAFE FIGHT PROGRESSES.' * * * That at various times during said period from October 11, 1929, up to the time of the issuance of said temporary restraining order, as aforesaid, said pickets so employed by defendant association, as aforesaid, danced around on the sidewalk in front of plaintiffs' said restaurant, pointed at said restaurant and the persons therein, made grimaces and insulting gestures to and at the employees of plaintiffs, advanced near the door and prominently displayed to patrons in said restaurant said headlines derogatory to said restaurant, wildly waved said papers carrying said headlines against said restaurant, and displayed said papers by holding one spread across the chest of the picket so that said headlines against said restaurant could be plainly read by persons passing along the sidewalk in front of said restaurant or entering or leav-

ing said restaurant and by prominently waving and displaying another copy of said paper in the hand of the picket. That solely by reason of the maintaining of said pickets, as aforesaid, and the acts of said pickets as hereinbefore set forth, many persons who were regular patrons and customers of plaintiffs have been intimidated and caused and induced to cease and have ceased to patronize plaintiffs' said business." The court further found as follows: " * * * That the newspapers displayed by said pickets, as aforesaid, with the headlines referred to said restaurant, as aforesaid, were copies of the East Bay Labor Journal and that said paper has been declared a newspaper of general circulation by decree of the Superior Court of the State of California, in and for the County of Alameda. But in this connection, the court finds that said newspapers were not displayed or offered for sale by said pickets in good faith or in the usual and ordinary manner, or for producing revenue or increasing circulation; that said newspapers were displayed by said pickets, as aforesaid, solely for the purpose of injuring and damaging plaintiffs and their said business and that defendants, pursuant to their said plan and conspiracy to injure and damage plaintiffs, procured and caused said headlines against said restaurant to be printed in bold type in said newspaper so that the same could be displayed in front of and near said restaurant of plaintiffs and at the same time assert the claim that said pickets were merely vendors of newspapers; that said claim of defendants that said pickets were bona fide newspaper vendors is a sham and subterfuge resorted to merely in an endeavor to cover up and conceal their real purpose, namely, to injure and damage plaintiffs. * * * " The foregoing findings are legally sufficient under the decisions of this state to justify the granting of injunctive relief. *Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n*, 186 Cal. 604, 200 P. 1, 4; *Pierce v. Stablenen's Union*, 156 Cal. 70, 103 P. 324; *Goldberg, etc., Co. v. Stablenen's Union*, 149 Cal. 429, 86 P. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219; *Rosenberg v. Retail Clerks' Ass'n*, 39 Cal. App. 67, 177 P. 864, 865; *Moore v. Cooks', etc., Union*, 39 Cal. App. 538, 179 P. 417.

[1, 2] Appellants contend that, even though the representatives stationed by them in front of respondents' café are deemed to be pickets, they were at most engaged in "peaceful picketing," which they claim, in the absence of any prohibitory state statutes or municipi-

pal ordinances upon the subject, may not be enjoined. It is evident, however, that the acts found to have been committed went beyond the bounds of peaceful picketing and amounted to physical intimidation of respondents' employees and patrons; and it is well settled by the decisions above cited that such acts will be enjoined. See, also, 15 Cal. Jur. 581, and cases there cited. In this regard it is held that, in order to prove physical intimidation and fear, it is not necessary to show that there was actual force or express threats of physical violence used; that such result may be accomplished as effectually by obstructing and annoying others and by insult and menacing attitude as by physical assault. *Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n*, supra; *Jordahl v. Hayda*, 1 Cal. App. 696, 82 P. 1079; *Martin on Labor Unions*, p. 229. In so holding the Supreme Court, in the case of *Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n*, supra, in quoting approvingly from another case [*Allis-Chalmers Co. v. Iron Molders' Union (C. C.)* 150 F. 155, 173], said that "intimidation * * * includes persuasion by or on behalf of a combination of persons, * * * resulting in coercion of the will from the mere force of numbers"; and the court then points out that the same rule is declared in *Martin on Labor Unions*, supra, as follows: "Even a simple 'request' to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimation, with a design to hinder or obstruct workmen, is unlawful intimidation, and not less obnoxious than the use of physical force for the same purpose." The rule is applied with equal force as to customers and patrons. *Goldberg, etc., Co. v. Stablemen's Union*, supra.

[3] With respect to the display of the labor journal in front of respondents' place of business by appellants' representatives, it is of course true that the constitutional guaranty against abridgment of the freedom of the press carries with it freedom of circulation and sale of the publication (*Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877), and obviously the fact that a newspaper may support and advocate the cause of a trades union in a controversy with an employer, and uses its columns and headlines to bring to the attention of the public the claim of the union that the particular business in question is being operated in a manner deemed unfair to labor, serves as no legal ground for interfering with the sale or circulation of such newspaper in the immediate vicinity of the place

where such business is being carried on, or elsewhere. But it is held in the case of *Goldberg, etc., Co. v. Stablemen's Union*, supra, that it is an invasion of the constitutional right to acquire, possess, and enjoy property, to place pickets in front of a place of business bearing placards and signs for the purpose of intimidating the patrons or employees of such place of business, and that such acts will be enjoined; and in the present case the trial court found, as already shown, that the display of said journal in front of respondents' place of business was not in good faith for the purpose of circulating or selling the same, and that said journal was not offered for sale in the usual and ordinary manner by newspaper vendors, but was displayed by appellants' pickets as a sham and subterfuge for the purpose of intimidating the patrons and employees of said place of business. It is evident, therefore, that the acts of appellants' representatives in displaying said journal in front of respondents' place of business in the manner and for the purposes found were brought within the rule of the *Goldberg Case*, supra, prohibiting the illegal display of signs and placards.

[4, 5] The injunctive relief granted, however, was, in our opinion, too broad, for the reason that, not only do the terms thereof go so far as to infringe upon the constitutional right to freely circulate and offer said newspaper for sale upon the public streets, but under the law of this state, in the absence of contractual obligations, a trades union, besides having the right to call a strike, has the legal right also to carry on in connection therewith a boycott, both primary and secondary; and it is evident that the comprehensive terms of the injunction herein enjoin appellants from doing some of the acts which under the decisions of this state it may lawfully do in furtherance of a secondary boycott. As said in *Pierce v. Stablemen's Union*, 156 Cal. 70, at page 75, 103 P. 324, 327, supra: "The right of united labor to strike, in furtherance of trade interests (no contractual obligation standing in the way) is fully recognized. The reason for the strike may be based upon the refusal to comply with the employees' demand for the betterment of wages, conditions, hours of labor, the discharge of one employee, the engagement of another—any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employees. After striking, the employee may engage in a 'boycott,' as that word is here employed. As here employed, it means

not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means—of fair publication, and fair oral or written persuasion—to induce others interested in, or sympathetic with, their cause, to withdraw their social intercourse and business patronage from the employer. They may go even further than this, and request of another that he withdraw his patronage from the employer, and may use the moral intimidation and coercion of threatening a like boycott against him if he refuse so to do. This last proposition necessarily involves the bringing into a labor dispute between A. and B., C., who has no difference with either. It contemplates that C., upon the request of B., and under the moral intimidation lest B. boycott him, may thus be constrained to withdraw his patronage from A., with whom he has no controversy. This is the 'secondary boycott,' the legality of which is vigorously denied by the English courts, the federal courts, and by the courts of many of the states of this nation. Without presenting the authorities, which are multitudinous, suffice it to state the other view in language of the president of the United States, but recently uttered. [The language referred to is here quoted.] And continuing, the court said: "Notwithstanding the great dignity which attaches to an utterance such as this, which, as has been said, is but the expression of numerous courts upon the subject-matter, this court, after great deliberation, took what it believed to be the truer and more advanced ground, above indicated and fully set forth in *Parkinson v. Building Trades Council*, etc. [154 Cal. 581, 98 P. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165], *supra*. In this respect this court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withdraw its patronage from its employer, and to induce by fair means any and all other persons to do the same, and, in exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal. However opposed to the weight of federal authority the views of this court are, that they are not unique may be noted by reading *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Lindsay v. Montana Federation of La-*

bor, 37 Mont. 264, 96 P. 127, 18 L. R. A. (N. S.) 707 [127 Am. St. Rep. 722], where the highest courts of those states formulate and adopt like principles." Upon the same subject, and with particular reference to the right of striking employees to induce fellow employees to join in such strike, the Supreme Court, in the case of *Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n*, *supra*, said: "Furthermore, it is lawful for the employee who has quit to peaceably persuade a fellow employee to leave his position. Moreover, if there are a number of employees who had left a common employer, they are within their legal rights if and when they attempt as a group to persuade other employees, who continue to work, to quit, provided there be no force, violence, or intimidation, physical or moral, used—that is, the mere fact of numbers does not necessarily make such persuasion illegal."

In the present case the broad terms of the injunctive relief granted are doubtless based upon an abstract statement contained in the decisions in the cases of *Rosenberg v. Retail Clerks' Ass'n*, *supra*, and *Moore v. Cooks'*, etc., Union, *supra*, to the effect that "there is no such thing as peaceful picketing." However, the decision in neither of those cases was reviewed by the Supreme Court on petition for hearing before that court, and an examination of the decisions themselves will disclose that the statement referred to was founded on certain language used in the decision in *Atchison*, etc., *R. Co. v. Gee* (C. C.) 139 F. 582, which, as will be noted, was a federal case, and not only did it involve acts of actual violence, but, as pointed out by the Supreme Court in *Pierce v. Stablemen's Union*, *supra*, the legality of the secondary boycott, in furtherance of which acts of picketing are carried on, is "vigorously denied" in the federal jurisdiction. True, in the *Pierce* Case, the court goes on to say that picketing in its very nature is calculated to and naturally does incite crowds, riots, and disturbances of the peace; but the argument used was evidently intended to apply to such facts as were then before the court, which showed that the pickets actually used menacing terms and threatening language, such as: "* * * This is a scab stable. When we catch you outside, we will finish you. We will get you yet. It is a scab stable, full of scabs. We will fix you yet. It is a matter of time when we will get you all right. You will never get out of the stable alive. We will break you in half. We will beat you to death. When we catch you outside, we will

finish you." As further indication that the court in that case did not intend to hold in the abstract that there could be no such thing as peaceful picketing, we quote the following from its opinion: "As we have undertaken to define boycott, it is an organized effort to persuade or coerce, which may be legal or illegal, according to the means employed. In other jurisdictions where a definition is given to a boycott which imports illegality, the injunction will of course lie against boycotting as such. *In this state the injunction will issue depending upon the circumstance whether the means employed, or threatened to be employed, are legal or illegal*" (italics ours), which is in accord with the general rule declared in Ruling Case Law (vol. 10, p. 454) wherein it is stated that the decision of the question whether picketing is lawful or unlawful depends upon the circumstances surrounding each case; that taking every circumstance into account, if it appears that the object of the picketing is to interfere with those passing in or out by other than persuasive means, it is illegal; but that, if the design of the picketing is to see who can be the subject of persuasive inducement, such picketing is legal, and that whether picketing is lawful or unlawful depends in each particular case upon the conduct of the parties themselves. And the concurring opinion of Justices Angellotti and Sloss, in the Pierce Case, supra, may be taken also as indication of a belief on the part of the court in that case that all forms of picketing are not inherently unlawful, for it is there said: "So far as 'picketing' is concerned, while we are not prepared to hold that there may not be acts coming within that term, as it is accepted and understood in labor disputes, that are entirely lawful, and should not be enjoined, we believe that, as to such 'picketing' as is described in both findings and judgment in this case, the views expressed in the opinion of the court are correct." It will be noted, too, from an inspection of the opinion in the Pierce Case, supra, that, in order to conform to the views therein expressed upon the subject of secondary boycott, the terms of the injunction were modified, the court in this regard saying: "It was, for example, too broad in restraining defendants from 'in any wise interfering with' plaintiff's business, since the interference which we have discussed, of publication, reasonable persuasion, and threat to withdraw patronage, is legal, and such as defendants could employ. So, also, was the injunction too broad in restraining defendants from 'intimidating any cus-

tomers by boycott or threat of boycott' since, as has been said, the secondary boycott is likewise a legal weapon." So, also, in the case of Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n, supra, the injunction was modified to exclude from its operation a certain form of picketing, the court there saying: "The judgment as entered, however, is too broad in its terms, in that it purports to prohibit acts which may or may not be unlawful, according to the purpose for which they are done, and it does not clearly couple the acts with the unlawful purpose. Thus, for example, the placing of pickets near respondent's place of business for a purpose not at all connected with said business, and not for the purpose of intimidating employees of respondent, so as to coerce them to quit that employment, nor for the purpose of intimidating persons intending to become employees of respondent, so as to prevent them from doing so, could not appropriately be enjoined, since such an act would not be wrongful as against the respondent, and would not be calculated to injure the respondent's business." But as already shown, in that case, as in the present one, physical intimidation and fear was used in carrying on the secondary boycott; in other words, there, as here, in order to accomplish a legitimate object, appellants resorted to illegitimate means; consequently, those illegal acts were enjoined.

Therefore, in order to conform as far as possible with the views expressed in the cases above cited, and to follow the form of the judgment as modified in Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n, supra, it is ordered that the judgment herein be modified and re-entered to read as follows: "It is therefore ordered, adjudged and decreed that defendants herein and each of them and all persons acting for them or either of them or in aid or assistance of them or either of them be and they are hereby perpetually enjoined and commanded to desist and refrain directly or indirectly or by any means or method from doing or attempting to do any of the following described acts: (a) intimidating, threatening, molesting or coercing plaintiffs in the conduct of their business known as the 'Rainbow Cafe' situated at No. 1218 Broadway Street, in the city of Oakland, California, or for any such purposes obstructing or interfering with, or attempting to obstruct or interfere with the free use, occupation and enjoyment thereof by plaintiffs, their agents, servants and employees; (b) intimidating, threatening, mo-

lesting or coercing any employee or employees, customer or customers, patron or patrons, of plaintiffs; (c) stationing or placing any picket or pickets with the intention or for the purpose of intimidating, threatening, molesting or coercing, or attempting to intimidate, threaten, molest or coerce any customer, patron or employee of plaintiff now or hereafter patronizing or working for said plaintiffs. It is further ordered, adjudged and decreed that the plaintiffs do have and recover from defendants their costs of suit, taxed herein at the sum of \$44.50."

In reviewing cases of this kind and in framing the terms of injunctive relief it is, of course, as said in many of the decisions, impossible to define comprehensively or with exactness each and every act which may or may not be legally done in carrying on a labor controversy; and it is evident that any attempt so to do would lead into a field of unlimited speculation. All that the court can do is to deal with those specific acts which by the evidence are shown to have been committed in furtherance of the particular dispute then before it; and necessarily the question of whether future acts of a different character, if any there be, shall be deemed to fall within the inhibitive provisions of the judgment must be left, primarily at least, to the decision of the trial court in determining any subsequent proceedings based thereon.

As hereinabove modified, the judgment will stand affirmed, respondents to recover their costs.



2 Cal.2d 308

DISTRICT BOND CO. v. HALY et al.
L. A. 14794.

Supreme Court of California.

Jan. 29, 1935.

Usury ☞ 101

In action by creditor of corporation against stockholders to enforce statutory liability on account of money borrowed by corporation, usurious interest paid could be set off against principal debt.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the District Bond Company against George H. S. Haly and others. From a judgment for plaintiff, defendants appeal.

Judgment modified, and, as modified, affirmed.

For prior opinion, see 30 P.(2d) 1025.

Mott, Vallee & Grant, Birger Tinglof, Kenneth E. Grant, John G. Mott, and Chas. Cassatt Davis, all of Los Angeles, for appellants.

Dryer, Castle & Richards and Dryer, Castle, McConlogue & Richards, all of Los Angeles, R. B. McConlogue, of Cedar Rapids, Iowa, and P. H. Richards and W. E. Simpson, both of Los Angeles, for respondent.

PRESTON, Justice.

Upon consideration of this cause, we hereby adopt as our opinion herein the following opinion prepared for the District Court of Appeal, Second District, Division 1, by Mr. Justice Houser:

A judgment in favor of the plaintiff, District Bond Company, is the basis of the instant appeal, and was the result of an action brought by said plaintiff against certain stockholders of Syndicate Company, a corporation, to enforce the statutory liability as such stockholders on account of money alleged to have been borrowed by Syndicate Company from the plaintiff.

A large portion of the brief of the appellants is devoted to a consideration of each of several points, all of which being founded upon the basic question of whether the evidence adduced on the trial of the action was sufficient to sustain the several findings and the ensuing judgment. No useful purpose would be served by a statement of the gist of such evidence. Suffice it to say that, after a careful examination of the record herein, this court is convinced that the record is sufficient to justify the several conclusions thereon reached by the trial court; from which it follows that none of the several contentions of the appellants that are primarily dependent upon the asserted insufficiency of the evidence can be sustained.

It is also urged by the appellants that in each of several instances the trial court erred to the damage of the defense either in the admission or in the rejection of certain items of evidence. Upon an examination by this court of such specifications of error, although it may be that in strictness some of the proffered evidence that was ruled out might properly have been admitted or that some of the objections of the defendants to the admis-

sion of certain evidence which were sustained might well have been overruled, nevertheless, without conceding the existence of any such alleged error, but giving due weight to the probable combined effect of all of such assumed errors, it is clear that they could not have affected the final result of the trial.

Since the original promissory notes and each of the renewals thereof which evidenced the alleged indebtedness of Syndicate Company to District Bond Company, carried a provision by which, in the event that an action should be brought thereon, the obligor agreed to pay attorney's fees, it becomes manifest that the objection presented by appellants to the findings, the conclusion, and the judgment by the trial court with reference thereto, cannot prevail.

The original loans made by the plaintiff to Syndicate Company, of which the several defendants were stockholders, and which, as hereinbefore set forth, were evidenced by promissory notes, together with other written agreements or understandings between the interested parties, disclosed facts from which the ultimate conclusion was inevitable (as in effect was found by the trial court) that the agreed rate of interest to be paid by the borrower on each of such notes and the several renewals thereof was usurious. As in principle has been announced by the Supreme Court of this state in each of the cases of *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725, *Ames v. Occidental L. I. Co.*, 210 Cal. 271, 291 P. 182, and *Westman v. Dye*, 214 Cal. 28, 4 P.(2d) 134, the payment of usurious interest may be set off against the principal debt. Without contradiction of the fact, the record herein shows that in accordance with the agreement of the interested parties a total of \$45,697.07 was thus paid, and that in calculating the several amounts for which the respective stockholders were liable no account was taken of the said amount which should have been credited on the principal obligation.

In connection with the foregoing, it is ordered that finding No. XI, made by the trial court, be and it is amended so that, after such amendment has been made, it will read as follows: "That it is true that prior to the 21st day of June, 1926, the terms of the agreement between plaintiff and Syndicate Company required the payment of interest upon said indebtedness in excess of the rate of 12% per annum, and that subsequent to the 21st day of June, 1926, the terms of the agreement between the plaintiff and Syndicate

Company required the payment of interest at the rate of 12% per annum compounded quarterly, and that the terms of said agreement between the said parties were void as to the payment of interest thereon; and the interest so agreed to be paid thereon was usurious; that the total amount of money paid by Syndicate Company to District Bond Company by way of such usurious interest was the sum of \$45,697.07; and that no part thereof has been credited against the principal of said indebtedness."

It is further ordered that any other finding or findings, in whole or in part, made by the trial court, as far as in any respect the same may be, or which may appear to be, in conflict, or inconsistent with, finding No. XI as thus amended, shall be disregarded.

It is further ordered that, as to the appealing defendants, the total judgment against each of them be modified by reducing the amount thereof in the proportion that the sum of \$45,697.07 bears to the total of the principal debt of Syndicate Company to the plaintiff, as found by the trial court. As thus modified, the judgment is affirmed; appellants to recover costs.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.



2 Cal.2d 397

INDEPENDENCE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMIS-

SION et al.

S. F. 15206.

Supreme Court of California.

Jan. 31, 1935.

1. Master and servant ☞385(16)

Physician applying to Industrial Accident Commission for award of amount due for medical treatment of injured employee held merely claimant of lien incidental to award of compensation to employee (St. 1929, p. 323, § 24 (b, c); p. 420, § 9 (a).

2. Master and servant ☞348

It is purpose of Workmen's Compensation Act that any part or section thereof be liberally construed so as to extend benefits of act for protection of persons injured in course of their employment.

3. Master and servant ⇨400

Doctor, claiming lien for medical services to injured employee, is "party in interest," entitled to institute proceedings before Industrial Accident Commission for award of employee's compensation, on which doctor may impress lien by filing application for adjustment of his claim (St. 1917, p. 869, § 57; St. 1919, p. 918, § 17 (a, b, c); St. 1929, p. 323, § 24 (b, c), and p. 420, § 9 (a); Const. art. 20, § 21).

[Ed. Note.—For other definitions of "Party in Interest," see Words & Phrases.]

4. Master and servant ⇨397

Industrial Accident Commission has exclusive jurisdiction over all compensation claims against employer or insurance carrier involving medical, surgical, and hospital treatment of injured employee, in absence of express agreement between such parties (St. 1917, p. 869, § 57; St. 1919, p. 918, § 17 (a, b, c); St. 1929, p. 323, § 24 (b, c), and p. 420, § 9 (a); Const. art. 20, § 21).

5. Master and servant ⇨397

Initiation of proceedings before Industrial Accident Commission for award of compensation to injured employee by doctor claiming lien for medical services *held* not objectionable as destroying employee's privilege of refusing to bring such proceedings or jeopardizing rights of employee, employer, or insurance carrier (St. 1917, p. 869, § 57; St. 1919, p. 918, § 17 (a, b, c); St. 1929, p. 323, § 24 (b, c), and p. 420, § 9 (a); St. 1923, p. 438, § 18 (b); Code Civ. Proc. § 473).

6. Master and servant ⇨397, 398

Industrial Accident Commission, having acquired jurisdiction of proceeding for award of compensation to injured employee, has jurisdiction to hear and determine all claims for compensation arising from same transaction, whether seasonably filed or not, if claimants are brought in during commission's continuing jurisdiction.

7. Master and servant ⇨398

Injured employee became party to compensation proceedings, initiated by doctor's application to Industrial Accident Commission for adjustment of his claim for medical services, though employee's letter, stating that he wished to join in application, was not received by commission within six months after last treatment for injury.

8. Master and servant ⇨405(4)

Testimony of secretary to physician, filing application with Industrial Accident Commission for adjustment of his claim for medical services to injured employee, as to facts surrounding injury, and employer's re-

port to commission, *held* sufficient to establish jurisdictional facts that employee sustained injury arising out of and in course of his employment.

9. Evidence ⇨314(1)

Hearsay testimony may be presented before Industrial Accident Commission (St. 1917, p. 871, § 60 (a)).

10. Master and servant ⇨397

Industrial Accident Commission acted within scope of its jurisdiction in awarding compensation to injured employee and imposing lien thereon for medical services rendered to him by physician initiating compensation proceedings by filing application for adjustment of his claim (St. 1917, p. 869, § 57; St. 1919, p. 918, § 17 (a, b, c); St. 1929, p. 323, § 24 (b, c), and p. 420, § 9 (a)).

In Bank.

Petition by the Independence Indemnity Company, by E. Forrest Mitchell, Insurance Commissioner of California and liquidator of petitioner, for review and annulment of an order of the Industrial Accident Commission, allowing Henry Lohnes, an employee of the Wonderlite Neon Products Company, compensation for temporary total disability and a sum, payable directly to J. Minton Meherin, M. D., and others, for medical expenses.

Award affirmed.

Redman, Alexander & Bacon, Frank L. Guereña, and R. P. Wisecarver, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

CURTIS, Justice.

Petition for review and annulment of an order of the Industrial Accident Commission. The employee, Henry Lohnes, while employed by the Wonderlite Neon Products Company, was injured on December 26, 1932, when a heavy piece of iron fell on his right foot. His disability continued to March 23, 1933. The employer authorized medical treatment, and he was treated by Dr. J. Minton Meherin. The employer was insured with the Independence Indemnity Company, which company had a contract of reinsurance with the International Re-Insurance Corporation. Subsequent to the rendering of the medical treatment, both companies went into the hands of receivers. On August 10, 1933, Dr. J. Minton Meherin, being unable to collect the amount due him for medical treatment, filed an application with the Industrial Accident Com-

mission, wherein he was named as applicant and Henry Lohnes, Wonderlite Neon Products Company, Independence Indemnity Company, and International Re-Insurance Corporation were named as defendants. The case was set down for hearing, and a copy of the application and notice of hearing was served by the commission upon all the parties by mail; the notice to Henry Lohnes being sent to his last-known address in Redwood City, Cal. The Independence Indemnity Company filed an answer, and was represented at the hearing. The employee did not appear before the commission. Dr. J. Minton Meherin did not appear, but filed a report which particularly described the injury and its treatment and stated that the patient was finally dismissed as cured on March 23, 1933. The secretary of Dr. Meherin, who had taken the case history from the injured employee, testified as to the facts surrounding the injury as reported to her by the injured employee. Subsequent to the hearing before the commission, the referee wrote a letter to the employee addressing it to Pekin, Ill., asking the employee if he wished to join in the present claim and submit it on the record as it then stood. The employee returned said letter with the following notation at the end of the letter: "I wish to join in the application which was filed in the claim of Dr. J. Minton Meherin, No. 42222, and submit my claim on the present record. (Signed) Henry Lohnes." This communication was received on October 19, 1933, which was more than six months after the date of the termination of the medical treatment. The commission thereupon issued its award allowing the employee compensation for temporary total disability at the rate of \$9.54 a week, or a total of \$109.03, of which \$66.76 had been paid by the insurance carrier, leaving a balance of \$42.27 due. An award was also made in favor of the employee in the sum of \$42 for medical expenses, of which \$37 was payable directly to Dr. J. Minton Meherin, and \$5 was payable directly to Drs. Rehfish and Garland. The petition for review is sought by E. Forrest Mitchell, as insurance commissioner of the state of California and liquidator of the original insurance carrier, the Independence Indemnity Company.

The chief objection to the award is based upon the fact that the original application for adjustment of the claim was made by Dr. Meherin, "a lien claimant," and that no proper application for adjustment of the claim was filed with the commission by either the employer or employee within the time limited

by statute, by reason of the fact that the letter filed by the employee, even if it be conceded to be an application, was filed after the statute had barred the filing of an application. There can be no question that, if Dr. Meherin was not entitled to file the application, no proper application was filed within the time allowed by the statute of limitation, and the whole award must be annulled. On the other hand, if Dr. Meherin was entitled to file said original application, the employee was entitled to be brought in by the Industrial Accident Commission at any time thereafter during which the commission had continuing jurisdiction and is entitled to the same consideration as if he had initiated the proceedings.

[1] Petitioner's contention that Dr. Meherin was only a lien claimant must be sustained. The decision in the case of *Pacific Employers' Ins. Co. v. French*, 212 Cal. 139, 298 P. 23, 24, holds plainly and unequivocally, and we think correctly, that the lien of a doctor or hospital furnishing medical treatment to an injured employee "is wholly incidental to the principal award, and without such award there can be no lien." That case is decisive, therefore, of the question of the nature of the interest of the doctor or hospital furnishing medical or surgical treatment to an injured employee.

In that case, recovery of payment for medical services rendered an injured employee was sought upon the theory that the Workmen's Compensation Act created a double liability on the part of an employer and his insurance carrier for medical services rendered an injured employee, a separate liability to the doctor and hospital rendering such services and a liability to the injured employee to pay him for such services. If a recovery was had upon the latter liability, a lien upon the compensation thus awarded to the injured employee arose in favor of the doctor and hospital. The court, in that case, after a thorough analysis of the constitutional authority upon which the Workmen's Compensation Act was based, and a careful examination of the various provisions of the Workmen's Compensation Act applicable, held that no separate independent right against the employer or insurance carrier had been conferred or had been attempted to be conferred by the act on doctors or hospitals furnishing medical services to injured employees, but that the only direct liability was a liability to the injured employee, and an award in favor of the injured employee must be made before a lien thereon could be imposed in favor of the doc-

tor or hospital. The determining factor in the decision reached in the French Case was the fact that it was a suit solely between the doctor and the hospital on the one hand against the insurance carrier on the other; the employer and employee having been purposely omitted from said controversy. This court stated in the opinion that the case was transferred to it for further consideration of the question "as to whether the Industrial Accident Commission has jurisdiction in a proceeding instituted by a doctor or hospital against an insurance carrier of an employer for the reasonable value of services rendered to an employee, where neither the employer nor the employee are parties to the action, and where the employee has never been before the commission." The District Court of Appeal stated in the opinion which was adopted by this court: "The employer and the employee were in each case omitted as parties to the proceeding and were not in any way brought before the commission." It appears from an examination of the record of the French Case that the doctor and hospital therein did not include the names of the employer or employee in its application to the commission. These names were added by the Industrial Accident Commission after the filing of the application, and notice of the hearing was given to them. However, at the outset of the hearing, the attorney for the applicant doctor and hospital stated that he did not desire to include the employer or employee in the controversy, whereupon, by order of the referee, the parties were dismissed from the proceeding. It followed, from the reasoning of the French Case that, as the constitutional authority for the enactment of the Workmen's Compensation Act limited the action of the Legislature to the creation of a liability of an employer to an employee, and the fundamental basis of the proceeding was an alleged liability of an employer to third persons, a doctor and hospital, no jurisdiction existed in the commission to determine such a controversy, and the award granted by the commission had to be annulled.

In the instant case, the difficulty encountered in making a valid award was attempted to be obviated by the naming, by the applicant doctor, of all parties having any possible interest in the subject-matter of the controversy as defendants. In effect, the doctor filed an application, not alone for himself, but also on behalf of the injured employee, and the basis of the proceeding was not an alleged independent right of the doctor against the employer, but the liability of the employer to the employee, to which the incidental

liability of the employer to the doctor was a necessary concomitant. If the employee is properly a party to the instant proceeding, no difficulty can arise with reference to making an award in his favor, and impressing thereon a lien in favor of the doctor, for the commission has jurisdiction over the subject-matter which involves the direct liability of the employer or his insurance carrier to the injured employee, and all claims and liens incidental thereto. In the instant case the regular procedure for the giving of notice required by the commission for the bringing in of the various parties to a controversy was followed by the commission. There is nothing in the record to indicate whether or not such notice was in fact received by the employee, and, in the absence of any showing to that effect, we cannot take it for granted that it was not properly given. The controversy therefore resolves itself into the question, Is a lien claimant, such as the doctor herein, a party in interest within the definition of the term as used by the Workmen's Compensation Act? If so, he is entitled to file an application and thereby institute before the Industrial Accident Commission a proceeding which may terminate in an award in favor of the injured employee, upon which may be impressed a lien in his favor.

Section 17 (a) of the act (St. 1917, p. 846, as amended by St. 1919, p. 918) provides that, "Upon the filing with the commission by any party in interest, his attorney, or other representative authorized in writing, of an application in writing stating the general nature of any dispute or controversy concerning compensation, or concerning any right or liability arising out of, or incidental thereto, jurisdiction over which is vested by this act in the commission, a time and place shall be fixed for the hearing thereof," etc.

[2] In determining whether or not the Workmen's Compensation Act intended to include as parties in interest lien claimants such as the doctor herein, it should be borne in mind that it is the purpose of the Workmen's Compensation Act itself that any part or section thereof be liberally construed, with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment, and that, as a practical matter, injured employees as a class will receive better and more willing medical service if remuneration for such services from an employer or insurance carrier is assured to doctors and hospitals than if instances may arise in which, if an employee neglects to file a claim for compensation, after

the services have been rendered, such doctors and hospitals may be required to look only to the injured employee for compensation. It should be borne in mind that the medical, surgical, and hospital treatment which is intended to be assured to injured employees as one of the items of their compensation by the act, will be more certain to be furnished if doctors and hospitals are assured of certain remuneration for their services. It is a matter of almost common knowledge that X-rays and other methods used for diagnostic and remedial treatments are not inexpensive, and a doctor or hospital cannot be blamed for failing to use expensive methods of diagnosis and treatment in the absence of any certainty of reimbursement.

[3,4] Aside from the practical reasons which demonstrate that the fundamental purpose of the act will be subserved by holding that a doctor who has furnished medical or surgical services to an injured employee is a party in interest, we are satisfied from an examination of those sections of the act which are pertinent to the problem here involved that it was the intention of act itself to include as a party in interest such lien claimants. Thus section 17 (a), which contains the above-quoted language with reference to the filing of an application by a party in interest, providing that the application so filed shall state the general nature of any dispute or controversy concerning compensation, "or concerning any right or liability arising out of, or incidental thereto, jurisdiction over which is vested by this act in the commission," would seem to directly confer upon a doctor lien claimant the right as a party in interest to file an application, since the words, "or incidental thereto," are peculiarly applicable to the doctor's claim. Section 17 (b), St. 1917, p. 846, as amended by St. 1919, p. 918, provides that the jurisdiction of the Commission shall include any controversy relating to or arising out of the provisions of subsection (a) of section 9 of this act, unless an express agreement shall have been made between the persons or institutions rendering such treatment and the employer or insurance carrier fixing the amount to be paid for the services. Section 9 (a), St. 1917, p. 836, as amended by St. 1929, p. 420, therein referred to, is the particular section which imposes upon the employer the duty of furnishing medical, surgical, and hospital care to an injured employee, and makes the payment required to be made for such services a part of the compensation to be awarded to the employee. This section therefore confers upon the commis-

sion jurisdiction over all controversies involving doctors' claims for medical services rendered an injured employee, with the exception of those cases in which an express agreement fixing the amount to be paid for the services has been entered into between the doctor and the employer or insurance carrier, in which event, the doctor's claim for payment being based upon an express contract, he is entitled to maintain an action at law. Section 17 (c), St. 1917, p. 846, as amended by St. 1919, p. 918, provides that "There shall be but one cause of action for each transaction coming within the provisions of this act, and all claims brought for medical expense, disability payments, death benefits, burial expense, liens or any other matter arising out of such transaction may, in the discretion of the commission, be joined in the same proceeding at any time." This subsection therefore likewise indicates an intention that the commission shall have sole jurisdiction of all controversies wherein there exists a liability toward the injured employee for compensation, including the item of medical expenses, whether such liability be the direct liability to the injured employee or the incidental liability to the doctor. That the commission does have and possess such exclusive jurisdiction is further confirmed by the fact that the commission is the forum in which must be determined, as a fact and preliminary to the awarding of any compensation whatever, that those conditions existed which are precedent to the granting of an award; that is to say, that the employee sustained an injury arising out of and occurring in the course of his employment. There is no escape from the conclusion, therefore, that the commission has exclusive jurisdiction over all claims for compensation against an employer or insurance carrier involving medical, surgical, and hospital treatment to injured employees, in the absence of an express agreement between such parties. It does not seem reasonable to conclude that the act expressly confers jurisdiction upon the commission over such controversy, expressly including the claim of a doctor or hospital for payment for services rendered an injured employee, but makes no provision whereby a claimant may present his claim to the tribunal to which jurisdiction of his claim is given. In other words, the Workmen's Compensation Act by the above provisions has made the Industrial Accident Commission the sole forum for the determination of all questions of liability for compensation to an injured employee, specifically including the item of compensation for medical services rendered him. Can it be

that it intended to limit the rights of doctors for payment for such services to the forum of the Industrial Accident Commission, and at the same time permit them to enter that forum only if the doors have already been opened by the filing of an application by an injured employee?

Section 24 of the act (St. 1917, p. 851, as amended by St. 1929, p. 323), which deals with the imposing of liens by the commission, provides in subsection (b) that "the commission may fix and determine and allow as a lien against any amount to be paid as compensation: * * * (2) The reasonable expense incurred by or on behalf of the injured employee, as defined in subsection (a) of section 9 hereof" (which is the section referring to expenses for medical, surgical, and hospital treatment). It also provides, subsection (c), that, "where it appears in any proceeding pending before the commission that a lien should be allowed if the same had been duly requested by the party entitled thereto, the commission may, in its discretion, and without any request for such lien having been made, order the payment of such claim to be made directly to the person entitled, in the same manner and with the same effect as though such lien had been regularly requested, and the award to such person shall constitute a lien against unpaid compensation due at the time of service of said award." This section clearly shows an intent that any person or institution furnishing medical or surgical services to an injured employee should be properly paid for the services and should be assured and guaranteed their payment. As above indicated, it does not seem reasonable that the act should provide so elaborately for jurisdiction of these controversies to vest solely in the commission, and yet provide no way in which such claimants can, if necessary, get their claims before the commission. This is particularly true of an act which purports to provide for "a complete system of workmen's compensation," including "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury." Article 20, § 21, California Constitution.

Section 57 of the act (St. 1917, p. 869) provides that "the commission shall have full power and authority: * * * (4) To provide for the joinder in the same proceeding of all persons interested therein, whether as employer, insurance carrier, employee, dependent, creditor or otherwise." The term "creditor" obviously includes lien claimants, and

no good reason exists why "the persons interested" who may be joined in the same proceeding should not be coextensive with "any party in interest" who may initiate proceedings before the commission. We think it was so intended in the act.

[5] It is true there appears to be one objection to permitting the initiation of the proceedings by a doctor as lien claimant, which is that, since the liability in controversy is one which is primarily due the injured employee, the employee should have the privilege of refusing to bring a proceeding if he does not desire to bring one, or, more accurately, the right to neglect to bring one, since in most cases the failure of an injured employee to file an application is due to negligence or a failure to understand his rights. This is at most merely a theoretical objection, for the reason that the injured employee is not the only one authorized by the act to institute or initiate proceedings. It is a fairly common practice for proceedings to be initiated by an employer or insurance carrier, and certainly even under a narrow construction of section 17 (a) of the act, as amended, they are parties in interest entitled to do so. Moreover, since the filing of the application by a doctor must always work to the benefit of an injured employee since it stays the running of the statute of limitation, it is difficult to imagine an injured employee who would wish to insist upon the chimerical privilege. It should be noted in this regard, that no rights of an injured employee are jeopardized by allowing a doctor lien claimant to initiate the proceedings, for, if the injured employee receives notice and joins in the application, his rights are properly taken care of; if he does not join in the proceeding for lack of receiving actual notice or otherwise, he may apply to the commission, under section 18 (b) of the act (St. 1917, p. 847, as amended by St. 1923, p. 438), as a defendant claiming to be aggrieved, for relief substantially in accordance with the provisions of section 473 of the Code of Civil Procedure.

It should also be noted that neither are the rights of an employer or insurance carrier jeopardized by allowing an application to be filed by a doctor lien claimant. They have received a premium to cover the liability for medical services, and it will always be necessary, regardless of the manner in which the proceedings are initiated, before any award of compensation can be made by the commission to the injured employee or a lien imposed thereon in favor of a lien claimant, that satisfactory proof be offered that the injured

employee was entitled to compensation by reason of the fact that he sustained an injury arising out of and occurring during the course of his employment.

Summarizing the above reasoning, we are of the opinion that the reasons above set out, considered in their entirety, compel the conclusion that a doctor, who has rendered medical or surgical services to an injured employee entitled to compensation, is a party in interest. Moreover, we think it can be safely said that, although a doctor's right to payment for medical services is incidental to the employee's right to compensation, nevertheless a doctor who has rendered medical services to an injured employee has an interest in the subject-matter of the controversy, which interest is not a future contingent interest, but an interest which arises simultaneously with the right of the injured employee to look to the employer or the insurance carrier for payment of his medical expenses, and that this pecuniary interest held by the doctor in the result of the proceedings before the commission is sufficient to bring him within the class designated by the act as parties in interest.

[6, 7] Petitioner further claims that, as the letter written by the injured employee to the Commission was received by the latter after the time within which an application for compensation could be filed, therefore the application of the employee was barred by the statute of limitations, and, as the employee's right to recover compensation was barred, the claim of the doctor, being merely incidental to that of the injured employee, cannot be sustained. This contention is necessarily based upon the assumption that the filing of a claim by the doctor lien claimant was a nullity, and that the statute was not tolled by the filing of his application, for it is settled authority that the commission having once acquired jurisdiction has jurisdiction to hear and determine claims of any and all persons for compensation arising from the same transaction whether the latter were seasonably filed or not, provided such parties were brought in during the continuing jurisdiction of the commission. 27 Cal. Jur. § 126, p. 453; *Great Western Power Co. v. Industrial Accident Commission*, 196 Cal. 593, 238 P. 662; *Fogarty v. Dept. of Indus. Relations*, 206 Cal. 102, 273 P. 791. Indeed, petitioner practically concedes that, if the doctor was empowered to file the application, other claimants could come in at any time within the continuing jurisdic-

tion of the commission, when it presents the claim that a doctor should not be permitted to file an application because to permit him to do so would have the effect of waiving the statute of limitations for a period of 240 weeks. As we have held herein that the doctor is a party in interest entitled to file an application with the commission, the contention that the employee was not a party because no application was received from the employee personally within the six months' period subsequent to the last treatment for the injury cannot be upheld. Moreover, in view of our holding that the doctor was entitled to initiate proceedings as a party in interest, the question of the date on which the letter from the employee was received by the commission is really immaterial, as such employee, having been named as a party and served in the manner prescribed by the rules and regulations of the commission, was already properly before the commission at the time of the hearing.

[8, 9] We are satisfied from a reading of the return to the writ of review that the jurisdictional facts, that the injured employee sustained an injury which arose out of and in the course of his employment, existed. It is true that the employee did not testify personally, but the facts, which were not disputed by the employer or insurance carrier, were supplied by the testimony of Dr. Meherin's secretary. It is true that this testimony is hearsay, but it is well settled that hearsay testimony may be presented before the commission. Section 60 (a), *Workmen's Compensation Act* (St. 1917, p. 871); *Pacific Gas & Elec. Co. v. Ind. Acc. Comm.*, 180 Cal. 497, 181 P. 788; *State Comp. Ins. Fund v. Ind. Acc. Comm.*, 195 Cal. 174, 231 P. 996. In addition, the employer's report stating all the facts of the injury was presented to the commission. The employee in his notation to the letter to the commission specified that the award should be based upon the record as already made. The petitioner as a party represented at the hearing was familiar with that record, and had already had an opportunity to meet any evidence therein presented.

[10] It follows that the basis of the instant proceeding, being the liability of an employer to an injured employee, and the employee being a party to the proceeding, the application having been filed by a doctor lien claimant who was entitled as a party in interest to initiate such proceeding, the commission was acting within the scope of its jurisdiction in making the award of compensation to the in-

jured employee, and imposing thereon a lien in favor of the doctor claimant.

The award so made is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; LANGDON, J.

THOMPSON, J., deeming himself disqualified, does not participate herein.



2 Cal.2d 411

INDEPENDENCE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION

et al.

S. F. 15205.

Supreme Court of California.

Jan. 31, 1935.

1. Master and servant ☞417(5)

On petition to review Industrial Accident Commission's award to injured employee for medical expenses in sum payable to doctor filing application for adjustment of his claim, presumption is that commission properly performed its duty to give employee notice of hearing on application.

2. Master and servant ☞385(16)

Industrial Accident Commission's award to injured employee for cost of medical services, rendered by doctor applying for adjustment of claim therefor, and imposition of lien thereon in doctor's favor, *held* valid.

In Bank.

Petition by the Independence Indemnity Company, by E. Forrest Mitchell, Insurance Commissioner of California and liquidator of petitioner, to review and annul an award of compensation by the Industrial Accident Commission in favor of R. G. Harrol, an employee of the Healy-Tibbetts Construction Company, against petitioner as insurance carrier and another, for medical expense payable directly to J. Minton Meherin.

Award affirmed.

Redman, Alexander & Bacon, Frank L. Guarena, and R. P. Wisecarver, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

CURTIS, Justice.

Petition to review and annul an award of the Industrial Accident Commission. R. G. Harrol, the employee, was injured on February 24, 1933, when a spike pierced his thigh. He was employed at the time as an engineer at Yerba Buena Island, Cal., by Healy-Tibbetts Construction Company. The injury, although it did not cause temporary disability beyond the waiting period of seven days, required medical attention, and this care was authorized by the employer. The employee was treated by Dr. J. Minton Meherin, and a bill of \$7.15 was incurred. The Independence Indemnity Company was the insurance carrier of the employer at the time of the injury. This company was reinsured with the International Re-Insurance Corporation. Both these companies subsequently went into receivership. Dr. J. Minton Meherin filed an application for an adjustment of the claim with the commission on July 1, 1933, naming as defendants therein Healy-Tibbetts Construction Company, the Independence Indemnity Company, and R. G. Harrol, the injured employee. The case was set down for hearing by the commission, and notice of the hearing was served on all the parties by mail; the notice to R. G. Harrol being mailed to him, care of Dr. J. Minton Meherin, at Dr. Meherin's office address, as his last-known address. The employee did not appear before the commission at the hearing, and no communications were received from him. The jurisdictional facts, that the injury arose out of and occurred during the course of his employment were established by the testimony of Dr. Meherin's secretary, who had taken the case history from the injured employee at the time of his treatment, and by the report of the accident by the employer to the insurance company. In addition, there was filed by Dr. Meherin an attending physician's report, which stated the nature of the injury and the treatment. At the hearing, the referee joined as a party defendant the International Re-Insurance Corporation. An award was made by the commission in favor of the injured employee, R. G. Harrol, against the Independence Indemnity Company and International Re-Insurance Corporation for the sum of \$7.15 for medical expense, payable by way of lien directly to J. Minton Meherin.

[1, 2] This is a companion case to the case of Independence Indemnity Co., etc., v. In-

dustrial Accident Comm. (Cal. Sup.) 41 P. (2d) 320, this day decided. The objection was made here, as it was made there, that, in the absence of the filing of an application for an adjustment of claim by the injured employee, the commission was without jurisdiction to make an award against the employer and the insurance carrier in favor of the injured employee and impose thereon a lien in favor of a doctor furnishing medical services to such employee. We have held in the case of Independence Indemnity Co., etc., v. Industrial Accident Comm., supra, that the doctor lien claimant was entitled as a party in interest to initiate such proceedings before the commission; that the employee having been named in said application as a party and served with notice as prescribed by the rules and regulations of the commission, was a party to said proceeding; that the commission was acting within the scope of its jurisdiction in making an award in favor of the injured employee and imposing thereon a lien in favor of the doctor; and that therefore said award, so made, was a valid award. In that case the employee, in response to a letter of inquiry from the commission, written after the hearing had been held, wrote to the commission asking to be joined in said proceeding. We held that the sending of the letter by the employee to the commission was, in fact, immaterial, as the employee was already properly a party, having been named as a defendant and served with the notice after the manner prescribed by the commission. Although the notice to the injured employee in this case was mailed to the office and in the care of the doctor who filed the application with the commission, in the absence of any showing that this was not the last-known address of said employee, and having in mind the fact that the notice was given by the commission itself, and the presumption attaches that the commission properly performed its duty, it must be held, we think, that the injured employee was a party to the proceedings, and the award made by the commission in his favor for the cost of medical services rendered him, and the imposing of a lien thereon in favor of the doctor rendering such medical services, was a valid award.

The award so made is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; LANGDON, J.

THOMPSON, J., deeming himself disqualified, does not participate herein.

GREVA et al. v. RAINEY.

WOOD et al. v. SAME.
L. A. 13988, 13989.

Supreme Court of California.
Jan. 31, 1935.

Rehearing Denied March 1, 1935.

1. Banks and banking ☞80(3)

At common law, depositors could not recover interest during liquidation, as against stockholders.

2. Banks and banking ☞80(3)

Bank Act being silent as to interest, depositors could recover from surplus assets, as against stockholders, interest during liquidation (Civ. Code, § 3302; St. 1913, pp. 192, 193, §§ 136, 136b; St. 1919, p. lxxxiii, § 1).

3. Banks and banking ☞80(3)

Bank Act being silent as to interest, depositors in commercial department held not entitled to recover interest during liquidation of bank before payment of claims of depositors in savings department, since all creditors of insolvent debtor should be treated equally, unless statute provides otherwise (St. 1909, p. 93, § 26; St. 1913, pp. 150, 151, §§ 24, 27; St. 1921, p. 1370, § 23).

4. Appeal and error ☞891

Appellants' application to produce additional evidence was denied where evidence, if presented, would not justify different conclusion.

In Bank.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Separate actions by Nels Greva and others, and by Frank L. Wood and others against Edward Rainey, State Superintendent of Banks, and Liquidating Agent of the Pan American Bank of California, were consolidated. From an adverse judgment in each case, plaintiffs appeal.

Modified and affirmed.

Rehearing denied; LANGDON, J., dissenting.

Prior opinions, 33 P.(2d) 697; 33 P.(2d) 702.

Dockweiler, Dockweiler & Finch, Walter E. Burke, Stanley & Lewis, Howard S. Lewis, and Fred B. Stanley, all of Los Angeles, and Robbins & Van Fleet, and Devlin & Devlin & Diepenbrock, all of San Francisco, for appellants.

Sullivan, Roche, Johnson & Barry, and Matt I. Sullivan, all of San Francisco, for respondent.

Mathes & Sheppard, of Los Angeles, amici curiæ for American Surety Co. of New York.

Charles Dell Rubin, of Los Angeles, and Colladay, McGarraghy, Colladay & Wallace, of Washington, D. C., amici curiæ for Pacific States Corporation.

SHENK, Justice.

An action was brought by Nels Greva and others, who were depositors in the savings department of the Pan American Bank of California, which is in process of liquidation, for a declaration of the powers and duties of the defendant as liquidating agent, under the provisions of the California Bank Act (St. 1909, p. 87, as amended). They sought a declaration that the defendant superintendent of banks, as such liquidating agent, should transfer the balance of funds in the commercial department, after payment of 100 per cent. of the claims of the depositors in that department and before payment to them of any interest during the period of liquidation, to the savings department to be applied to the payment of the claims of the savings depositors. In the action of Wood et al. v. Rainey, etc., consolidated therewith, the plaintiffs were stockholders of the bank. They sought a similar declaration, and, in addition, a declaration that no interest should be paid to the creditors or depositors before distribution to the stockholders. The court declared and decreed adversely to the plaintiffs' contentions in each case and both sets of plaintiffs have appealed.

The Pan American Bank was chartered pursuant to the provisions of the Bank Act of this state. Chapter 76, St. 1909, p. 87, as amended. It organized with three departments, a trust, a commercial, and a savings department. It conducted its operations until July 19, 1929, when the defendant's predecessor, exercising the powers vested in him by section 136 of the act (St. 1909, p. 115, as amended by St. 1913, p. 192), took possession of the property and business of the bank and ordered its liquidation.

The liquidation of the bank proceeded to the point where all of the creditors of the trust department were paid the amount of their claims, without interest from July 19, 1929, and a surplus of \$144,753.38 was transferred from that department to the savings and commercial departments, the latter receiving about \$57,000 of such surplus. After payment of 100 per cent. of the claims of the depositors of the commercial department, without interest from July 19, 1929, a surplus remained of which \$86,000 was retained in that department to await the determination

of the questions herein presented, and the balance, amounting to some \$100,000, was transferred to the savings department. The creditors of the savings department have been paid 85 per cent. of their claims, and there will not be sufficient funds to pay the full 100 per cent. of their claims computed as of July 19, 1929, unless the balance remaining in the commercial department is transferred to the savings department without payment of interest from July 19, 1929, to the commercial depositors. The actions herein followed and there are presented two main questions: (1) Are the depositors of the commercial department entitled to interest on their claims from July 19, 1929, the date the bank closed its doors, to the date of payment of their claims, before any transfer of funds may be made to liquidate the claims of depositors in the savings department? and (2) Are depositors in any event entitled to interest on their claims from the date of the closing of the bank as against the stockholders of the bank?

The Bank Act is silent on the question of interest in either case. It is contended that such silence does not prevent the application of the general law providing for the legal rate for delay in payment of a money obligation. Section 3302, Civ. Code; section 1, Usury Act, St. 1919, p. lxxxiii.

By section 136 of the Bank Act the superintendent of banks is directed to call a meeting of the stockholders when he "shall have paid to each and every depositor and creditor of such bank whose claim or claims as such creditor or depositor shall have been duly proved and allowed, the full amount of such claims. * * *" No other provision of the act is helpful in determining whether the "full amount of such claims," within the meaning of that section, includes interest at the legal rate from the time the bank's doors were closed until the claims are paid.

The language of section 136b of the act (St. 1909, p. 87, as added by St. 1913, p. 198), providing that in any action brought under the act "no damage may be awarded," does not purport to deal with the question of interest on creditors' claims during the period of liquidation under the facts of this case.

[1, 2] At common law, interest was not recoverable. See *National Bank of Commonwealth v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. Ed. 176. In cases where the special statute involved is silent on the question of interest, a host of authorities appears to have settled the question by the application of the general statutes providing for interest in upholding the right of the creditors to re-

cover interest on their claims whenever a surplus of corporate assets remains, before any distribution of such surplus assets is made to the stockholders of the corporation.

In the case of *State ex rel. McConnell v. Park Bank & Trust Co.*, 151 Tenn. 195, 268 S. W. 638, 39 A. L. R. 449, where the question arose as between the creditors and the stockholders, a similar provision of the banking law was involved, i. e., the superintendent of banks was directed to deliver to the firm or individual banker the assets remaining after he had paid every depositor and creditor whose claims were duly proved and allowed the full amount of such claims. Likewise the bank law was silent on the matter of interest. It was held that the chancellor properly applied the general laws relating to the payment of interest, and the judgment decreeing the surplus fund to the creditors as interest was affirmed. In its discussion the court reviewed other cases to like effect, including cases involving the National Banking Act, which also lacks any express provision on the matter of interest, and wherein it was also decided that demand for such interest is unnecessary, but that the interest was properly computed from the date of suspension of business. That case and the cases cited in the annotation following the report in 39 A. L. R., at page 457 et seq., disclose that the general rule that after property of an insolvent is in custodia legis interest thereafter accruing will not be allowed, is not applicable where the assets of the debtor are sufficient to pay the claims with interest. Those cases declare that the statement that interest will not be computed from the date of insolvency became the general rule, not because the claims were considered to have lost their interest-bearing quality, but because in the great majority of cases the assets were insufficient to pay both the principal and the interest which would otherwise become due; for, "if, as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid." *American Iron & Steel Mfg. Co. v. Seaboard Air Line R. Co.*, 233 U. S. 261, 34 S. Ct. 502, 504, 58 L. Ed. 949; *People v. California Safe Deposit & Trust Co.*, 34 Cal. App. 269, 272, 167 P. 181.

In *Johnson v. Norris*, 190 F. 459, 111 C. C. A. 291, L. R. A. 1915B, 884, certiorari denied, 232 U. S. 723, 34 S. Ct. 479, 58 L. Ed. 815, it is pointed out that were the rule otherwise the extraordinary result would follow that a delay in payment brought about by a proceeding to liquidate assets to satisfy the

claims of creditors would prevent the creditors' collecting interest from an estate able to pay it, when the general law is that interest is given for delay in payment. The remark made by the court in *Brown v. Lamb*, 6 Metc. (Mass.) 203, that "he becomes in fact a solvent debtor, and his duties and obligations are the same with those of other solvent debtors," becomes pertinent in any case involving a liquidation proceeding where sufficient assets remain to pay interest on the claims of creditors and there is no express statutory provision withholding application of the general laws that interest at the legal rate is payable. The following authorities, among others, are also pertinent in support of the proposition that the creditors of the bank are entitled to have interest paid out of surplus assets from the date of suspension of business to the time of payment in the absence of an express statutory prohibition, before the rights of the stockholders may be considered, and under these authorities the result appears to be the same whether the bank has voluntarily closed its doors or possession of its property and business has been taken by an officer vested by law with power to liquidate and distribute its assets, or appointed by a court for that purpose. *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200, 201; *People v. Merchants' Trust Co.*, 187 N. Y. 293, 79 N. E. 1004, 1005; *In re People by Stoddard*, 249 N. Y. 139, 163 N. E. 129; *Green v. Stone*, 205 Ala. 381, 87 So. 862; *McGowan v. McDonald*, 111 Cal. 57, 72, 43 P. 418, 52 Am. St. Rep. 149; *Zang v. Wyant*, 25 Colo. 551, 56 P. 565, 568, 569, 71 Am. St. Rep. 145; *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085; *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 69 A. 771, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378; *Baker v. Williams & England Banking Co.*, 42 Or. 213, 70 P. 711; *Hays v. City Bank of Greenwood*, 70 S. C. 31, 48 S. E. 736; *Richmond v. Irons*, 121 U. S. 27, 64, 7 S. Ct. 788, 30 L. Ed. 864; *National Bank of Commonwealth v. Mechanics' National Bank*, 94 U. S. 437, 24 L. Ed. 176; *Ohio Savings Bank & Trust Co. v. Willys Corp. (C. C. A.)* 8 F.(2d) 463, 44 A. L. R. 1162; *Chemical Nat. Bank v. Bailey*, 5 Fed. Cas. 537, No. 2,635; 23 R. C. L. 104, 105; 14a Cor. Jur. 1014, 1015; 44 A. L. R. page 1171, note, and cases cited; 19 L. R. A. (N. S.) note pages 430, 431, and cases cited.

In commenting upon the statement in *People v. American Loan & Trust Co.*, supra, that "if the assets are sufficient to pay all, including interest, it must be paid, for, as against the corporation itself, interest should be allowed before the return of any surplus

to the stockholders," the court in *People v. Merchants' Trust Co.*, supra, said: "It may be admitted that these remarks were unnecessary to the disposition of the case then under consideration, but the rule thus asserted appears to us to be so eminently just and so well supported by other authority that we now have no hesitancy in adopting it as the rule that should be adhered to in disposing of questions of this character." Citing other cases.

The case of *Tredegar Co. v. Seaboard Air Line Ry.* (C. C. A.) 183 F. 289, is not necessarily opposed to the authorities which seem clearly to settle the question. There the court, in refusing to reverse the ruling that the claimant was not entitled to interest, held that the insolvent condition, i. e., the insufficiency of the assets to pay all claims, was confessed by the record. In *Ohio Savings Bank & Trust Co. v. Willys Corp.*, supra, and *American Iron & Steel Mfg. Co. v. Seaboard Air Line R. Co.*, supra, the *Tredegar Case* is recognized as applying the general rule that where assets are insufficient interest is not recoverable.

[3] It is contended by counsel for the defendant that the foregoing authorities compel the conclusion that interest is payable to the creditors in the commercial department before the defendant may be directed to transfer surplus funds from that department to pay the claims of other creditors. This is claimed to be the result because of the provision of the Bank Act which states that the assets of each department of the bank shall be applied solely to the claims of creditors of that department, and other provisions now to be noted.

Section 23 of the Bank Act (St. 1909, p. 93 as amended by St. 1921, p. 1370) provides for the apportionment of the capital and surplus to each department with the approval of the superintendent of banks and that such apportionment may be changed with his previous consent and approval. Section 24 (St. 1909, p. 93, as amended by St. 1913, p. 150) prohibits a bank from opening a new department without obtaining the certificate of the superintendent of banks and complying with the requirements specified. By section 26 (St. 1909, p. 93) a bank having several departments is required to keep the books, deposits, reserves, cash, securities, investments, etc., separate from each of the other departments. Section 27 (St. 1909, p. 94, as amended by St. 1913, p. 151) provides: "All money and assets belonging to each department, whether on hand or with other banks, and the invest-

ments made, shall be held solely for the repayment of the depositors and other claimants of each such department, as herein provided, until all depositors and other claimants of each such department shall have been paid, and the overplus then remaining shall be applied to any other liabilities of such bank." It is urged that as a result of the foregoing provisions each department must be considered as if it were a separate bank, and that the creditors of each are entitled to have the assets of the department applied to the payment of their claims with interest from the date of the closing of the bank to the time of payment before any surplus may be applied to the payment of the claims of other creditors.

As noted, the Bank Act is silent in the matter of payment of interest. No express provision is included in section 27 to the effect that the money and assets of each department are to constitute a fund for the payment of the claims, with interest. Counsel for the defendant urge that the basis for the solution of the question as between the creditors and the stockholders, that is, that interest is payable where the assets permit, in the absence of any statutory prohibition, compels the same conclusion when the question arises between the creditors of the different departments of the same bank, under the structure provided by the act and with the attendant obligations and duties imposed for their benefit. However, the rationale of the decisions leads to the opposite conclusion. The decisions, including those hereinabove cited, are uniform to the effect that in so far as is possible the creditors of an insolvent debtor must be treated on a basis of equality. See, also, *White v. Knox*, 111 U. S. 784, 4 S. Ct. 686, 28 L. Ed. 603; *Thomas v. Western Car Co.*, 149 U. S. 95, 116, 117, 13 S. Ct. 824, 37 L. Ed. 663. That, indeed, is the premise from which springs the rule that interest ordinarily will not be computed nor paid from the date of the suspension of business, or commencement of the receivership or other liquidation procedure. Therefore, there being but one debtor involved, all creditors are entitled to equal consideration except where the statute expressly provides otherwise, and then only to the extent provided. It follows that the fact that section 27 requires the assets of each department to be held solely for the "repayment of the depositors" of that department is not to be held to enlarge the rights of such depositors so as to include interest when the act is silent on the matter and otherwise interest would not be recoverable. The reasoning to be applied when the question is one

of interest as between creditors is stated in *People v. American Loan & Trust Co.*, supra, viz.: "Interest should not run in favor of one creditor at the expense of another, while the law, acting for all, is administering the assets." We would be creating an exception to the general rule were we to hold in the present case, in the absence of express statutory language directing such payment of interest, that the creditors of one department were entitled to interest before other creditors of the bank had been paid their claims. In *Lamar v. Taylor*, supra, the question whether a creditor should be allowed interest as against another creditor was held to be distinct from the question whether interest was recoverable as against the stockholders.

Counsel present no authority which supports the contention that under the facts of the present case the creditors of the commercial department are entitled to interest during liquidation before the claims of the savings depositors are paid. In fact, the authorities cited support only the contrary conclusion. In *Lippitt v. Thames Loan & Trust Co.*, 88 Conn. 185, 90 A. 369, the statute (Pub. Acts Conn. 1907, c. 85, § 1) provided that investments of the savings department should be for the exclusive protection of the depositors of that department and should not be liable for nor be used to pay any other obligations or liabilities of the bank until after the payment of all the deposits in the savings department. There the court recognized the rule that any claims for interest on such deposits were payable only from surplus after claims of all creditors of the corporation had been paid.

People v. American Loan & Trust Co., supra, involved a statute (Laws N. Y., 1884, c. 260, § 1) which provided that in case of the dissolution of the company the debts due from the company as trustee, guardian, receiver, or depository of money in court or of savings bank funds should have a preference. Interest on such claims from the date of suspension was sought by the creditors so classified as having a preference. The court stated: "The claim of the preferred creditors, if sustained, would not only exhaust the funds in the hands of the receiver, and leave nothing for the unpreferred creditors, but would give them more interest than they had contracted for, or could have received if the company had not failed. * * *

"As the statute does not say that preferred claims shall be paid with interest to the date of payment, the courts should not, because

the claims of substantially all the creditors, both preferred and unpreferred, were alike in origin, for they were created by the deposit of money; and preferences in derogation of the common law should not be extended by construction beyond the express command of the statute. * * * Interest should not run in favor of one creditor at the expense of another, while the law, acting for all, is administering the assets. If the assets are sufficient to pay all, including interest, it must be paid, for, as against the corporation itself, interest should be allowed before the return of any surplus to the stockholders. As between the creditors themselves, however, no interest should be allowed during the process of administration. * * *

"Distribution should be made as of the date when the delay began, for it was not only caused by the law, but was necessary for the protection of all classes of creditors. As between the creditors themselves, therefore, interest ceases to accrue upon their respective claims, whether preferred or unpreferred, from the day when the corporation let go and the court took hold. This rule is so simple and easy of application that it will not only tend to prevent litigation, but will stimulate all creditors to frown upon delay and to promptly call the receiver to account. It will not induce preferred creditors to rest easy in reliance upon the expectation that they will make money through the misfortune of the corporation, and during the entire period of administration receive interest at a greater rate than they had contracted for."

In *Leach v. Sanborn State Bank*, 210 Iowa, 613, 231 N. W. 497, 499, 69 A. L. R. 1206, interest from the day of suspension was claimed by a depositor of public funds as a preferred claimant, before the claims of other depositors should be paid. The court rejected as authority cases cited to support its statement that the rule that distribution should be made as contended by the preferred depositor prevails in the federal and has support in some state courts, and said: "Had the Legislature intended that interest should be allowed upon the deposit of public funds, after the appointment of a receiver in preference of the claims of general depositors, it would have been a simple matter to have so provided. * * * No such discrimination is, or was, we think, contemplated." While expressly withholding pronouncement on the general question in other cases, the court also stated: "Suffice it to say that there is apparently a tendency on the part of state courts to deny interest on preferred claims unless the assets are sufficient to pay the claims of all

creditors in full. * * * The cases cited in the note following the report of that case in 69 A. L. R., at page 1210 et seq., support the court's comment.

In the case of *In re Prudential Trust Co.*, 244 Mass. 64, 138 N. E. 702, the statute (G. L. Mass. c. 172 § 62) provided that the deposits and investments of the savings department "shall be appropriated solely to the security and payment of such deposits, shall not be mingled with the investments of the capital stock or other money or property belonging to or controlled by such corporation, or be liable for the debts or obligations thereof until after the deposits in said savings department have been paid in full." One of the questions for determination was, When are the deposits in the savings department paid in full? It appeared that, when the savings depositors had received 100 per cent. of their claims, a surplus remained, and that the depositors in the commercial department had not received payment of their claims. The ruling was that the savings depositors were not entitled to interest against that surplus, but that the commercial depositors were entitled to have it transferred to apply on the principal of their claims. The court there pointed out that the provisions of the statute did not make the assets of the savings department the property of the depositors in that department to be in all events wholly distributed among them. In the present case no different conclusion is tenable merely by reason of the fact that in the California Bank Act the word "depositors" is used in lieu of the word "deposits" which appears in the Massachusetts statute.

The plaintiff stockholders here also place reliance upon the Prudential Trust Company Case in support of their contention that the depositors of each department are entitled only to payment of 100 per cent. of their claims and may not recover interest in any event. But at least one fact appearing in that case indicates that it may not be considered authority on the point, viz., the fact that there would not be a surplus after payment of the claims of the commercial depositors.

The defendant cites the case of *In re People by Stoddard*, 249 N. Y. 139, 163 N. E. 129, wherein it was held that assets deposited in this country by a foreign insurance company to protect the interest of investors here were liable for interest during the period of receivership before they were transferred for distribution to satisfy the claims of foreign creditors. On the facts of that case the con-

clusion is not opposed to the weight of authority. It was expressly noted in the decision that proof of claims of foreign creditors in this country was permitted only as a matter of favor for the purpose of distribution of the assets by the foreign receiver, and that the supposed analogy between the resident creditors in that case, and the preferred creditors of an insolvent corporation, was quite illusory inasmuch as the claimants in this country had more than a preference or a lien in the distribution of the assets involved, since they were the only claimants entitled to share in them.

It is apparent from the foregoing discussion and the authorities cited that when the bank is a going concern its separate departments pursuant to the Bank Act may be said to be conducted as though each were a separate bank, but when insolvency or other condition of its affairs forces it to close, all of its creditors are to be considered on an equality as the creditors of a single entity, except in so far as the Bank Act otherwise specifically provides.

The plaintiffs herein also sought from the trial court a declaration of the defendant's duties as such liquidating officer with respect to a sale of the balance of the assets of the bank and a termination of the liquidation by calling a meeting of the stockholders as provided in section 136 of the Bank Act. No question is raised as to the correctness of the court's findings and judgment on that phase of the controversy.

[4] The application of the appellants to produce additional evidence is denied for the reason that if the evidence to be produced were presented, a different conclusion would not be justified.

The judgment of the court as to the rights of the depositors to interest and transfer of funds is therefore modified so as to provide and declare as follows: That the depositors and creditors of the commercial department are not entitled to the payment of interest on their claims before the surplus funds in that department are applied to the payment of claims of other creditors of the bank, and that the depositors of the savings department are entitled to have the fund now held in the commercial department applied to the payment of their claims; that if any corporate assets remain after the claims of all depositors and creditors of the bank have been paid, the assets remaining shall be applied by the defendant to the payment of interest on such claims from the date of suspension

of business to the date of payment before any distribution is made to the stockholders.

As so modified, the judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.;
CURTIS, J.; THOMPSON, J.; LANGDON, J.



2 Cal.2d 418

**O'CONNELL v. SUPERIOR COURT IN
AND FOR CITY AND COUNTY OF
SAN FRANCISCO.**

S. F. 15245.

Supreme Court of California.

Feb. 13, 1935.

Rehearing Denied March 14, 1935.

1. Attorney and client ☞76(1)

Client, in absence of any relation of attorney to subject-matter of action other than that arising from his employment, has right to discharge attorney at any time, notwithstanding attorney has rendered valuable services or that client is indebted to him for services rendered or money advanced (Code Civ. Proc. § 284).

2. Attorney and client ☞76(1)

Client may not discharge attorney who has a specific, present, and coexisting interest in the subject-matter of the litigation on which attorney's power is to be exercised; such power being a "power coupled with an interest" which is defined as a power which accompanies or is connected with an interest and is irrevocable (Code Civ. Proc. § 284).

[Ed. Note.—For other definitions of "Power Coupled With an Interest," see Words & Phrases.]

3. Attorney and client ☞76(1)

Whether attorney has a power coupled with an interest in the subject-matter of litigation so as to render power irrevocable must be determined from entire agreement between attorney and client, notwithstanding agreement expressly states that attorney is given such interest (Code Civ. Proc. § 284).

4. Attorney and client ☞76(1)

Written employment agreement between attorney and client in which client agreed to pay attorney one-half of all he might recover, and which assigned to attorney as his compensation one-half of client's interest in oil assignment on which action was to be brought, and agreed that attorney could abandon employment at any time by waiving

compensation for services, held not to give attorney "power coupled with an interest" so as to preclude attorney's discharge on ground that attorney under agreement had an irrevocable agency (Code Civ. Proc. § 284).

In Bank.

Application for writ of mandate by Merle P. O'Connell, petitioner, against the Superior Court of the State of California, in and for the City and County of San Francisco, to compel respondent to grant a motion for substitution of attorneys, to which respondent demurred.

Demurrer overruled, and writ made peremptory.

Morris Oppenheim, of San Francisco, for petitioner.

Gregory, Hunt & Melvin and Aaron N. Cohen, all of San Francisco, for respondent.

WASTE, Chief Justice.

This is an application for a writ of mandate to be directed to the respondent superior court and compelling it to grant a motion, duly made, for substitution of attorneys in an action therein pending. The respondent has answered and demurred generally to the petition. Counsel of record in the court below refused to join in a stipulation substituting him out of the case and opposed the motion for substitution of attorneys on the ground that petitioner had theretofore, and in writing, conferred on him an irrevocable agency or power coupled with an interest in the subject-matter of the action. The respondent court obviously agreed with this contention in denying the motion for a substitution.

It appears that in 1923 the petitioner had procured from her then husband, Elmer O. O'Connell, an assignment of all his "right, title and interest in and to the proceeds of the production of oil, gas and other kindred substances" taken from certain designated real property. Subsequently the parties were divorced. At a later date, petitioner apparently concluded that she had not been receiving all she was entitled to under the terms of said assignment, whereupon she employed Aaron N. Cohen, the attorney here sought to be substituted out, to commence an action looking to the protection of her rights. Accordingly, a complaint was filed, naming as defendants the petitioner's divorced husband and an oil company, wherein it is alleged that said individual defendant, in violation of

petitioner's rights under the assignment above referred to, had received from the corporate defendant proceeds from the production of oil, gas, and other kindred substances, in an amount of \$66,911.42. The complaint concludes with a prayer for judgment in that amount and for an adjudication that petitioner is entitled to receive all other of such proceeds as may hereafter accrue.

At the time of employing said attorney, and prior to the filing of the complaint, petitioner and counsel entered into the written agreement giving rise to this proceeding. It reads:

"San Francisco, California,

"December 10, 1930.

"I, Merle P. O'Connell, hereby employ Aaron N. Cohen as my attorney to proceed against Elmer O. O'Connell in the matter of the correction of an erroneously drawn assignment.

"I agree to pay my said attorney one-half (1-2) of all that he may collect or recover by suit or compromise, and I give him full power to compromise.

"I hereby assign to my said attorney as his compensation one-half (1-2) of my interest, whatever that interest is now or may become, under that certain assignment recorded in Book 2534, at page 70, of Official Records in the office of the County Recorder in Los Angeles County, California.

"I agree that said attorney may abandon said employment at any time by waiving compensation for his services till then performed in said matter.

"Merle P. O'Connell.

"I accept the above employment on the above terms.

"Aaron N. Cohen."

[1] Section 284 of the Code of Civil Procedure provides that the attorney in an action or special proceeding may be changed at any time upon consent of both client and attorney or upon the order of the court upon the application of either client or attorney, after notice from one to the other. By virtue of this Code section, it is now settled in this state that in the absence of any relation of the attorney to the subject-matter of the action, other than that arising from his employment, the client has the absolute right to change his attorney at any stage in the action, and the fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right. *Gage v.*

Atwater, 136 Cal. 170, 68 P. 581. In the event his discharge is improper or without just cause, adequate remedies are available to the attorney by which he may seek reimbursement for such services and outlays on behalf of the client. *Kirk v. Culley*, 202 Cal. 501, 506, 261 P. 994.

However, to the rule that a client may discharge his attorney at any time, there is a well-recognized exception where the attorney has an interest in the subject-matter of the litigation. *Todd v. Superior Court*, 181 Cal. 406, 413, 184 P. 684, 7 A. L. R. 938; *Kirk v. Culley*, supra, page 505 of 202 Cal., 261 P. 994; *Kelly v. Smith*, 204 Cal. 496, 500, 268 P. 1057; *Scott v. Superior Court*, 205 Cal. 525, 531, 532, 271 P. 906; *Atchison v. Hulse*, 107 Cal. App. 640, 644, 290 P. 916. The leading definition of the character of "interest" essential, when coupled with a power, to make the latter irrevocable, appears in the early and leading case of *Hunt v. Rousmanier*, 8 Wheat. (21 U. S.) 174, 203, 5 L. Ed. 589, wherein, Chief Justice Marshall writing the opinion, it is declared: "Is it an interest in the subject on which the power is to be exercised? or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest,' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be 'coupled' with it."

[2, 3] This definition has been generally recognized and accepted and has received the unqualified approval of this court. *McColgan v. Bank of California Ass'n*, 208 Cal. 329, 335, 281 P. 381, 65 A. L. R. 1075; *Kunz v. Anglo & L. P. Nat. Bank*, 214 Cal. 341, 344, 5 P.(2d) 417; *Cap. Nat. Bank v. Stoll*, 220 Cal. 260, 264, 30 P.(2d) 411. The decisions agree that for a power to be coupled with an interest, so as to be irrevocable, there must be a specific, present, and coexisting interest

in the subject of the power or agency. Whether such an interest exists in any particular case is to be determined from the entire agreement between the parties. *Todd v. Superior Court*, supra, page 418 of 181 Cal., 184 P. 694, 689. In the cited case, the agreement between the parties though purporting to "assign" all of the subject of the power to the attorney in fact, and expressly declaring it to be the intention of the constituents to thereby create a power of attorney coupled with an interest, was held, when taken by its four corners, to constitute but "an assignment in trust to the attorney in fact in order to facilitate the collection of the legacies, and to insure the reimbursement of the attorney in fact for his outlays, and for compensation for his services. * * * The assignment, in other words, created a present interest in the legacies, but only in the sense we have indicated—to the extent of reimbursements and compensation. But this does not render the power irrevocable. The mere expression, 'a power coupled with an interest,' does not necessarily render the power irrevocable. It is plain from the foregoing authorities that the interest which the attorney in fact must have in the subject of the power in order to render the power irrevocable is such a beneficial interest in the thing itself, apart from the proceeds, that if the power were revoked he would be deprived of a substantial right. In other words, the relation of the attorney in fact to the subject-matter must be such that a revocation of the power would be inequitable. Such is not the case here. The interest in the proceeds of what may be collected is not, strictly speaking, a beneficial interest in the legacies. The interest is nothing more than an assurance that the attorney in fact will be reimbursed and compensated out of the legacies when collected. A revocation of the power would in no way deprive the attorney in fact of any right, for the reason that he is entitled to be reimbursed for any sums expended by him and to be compensated out of the legacies for any services rendered under the power up to the time of revocation."

[4] The contract of employment involved in the present case, and set forth above, cannot, when construed as a whole, be said to transfer and assign to the attorney a present and coexisting interest in the subject of the agency or power even though a particular paragraph thereof, to be hereinafter referred to, contains some language purporting to accomplish this result. The first paragraph of the agreement between the parties merely

provides for the employment of the attorney. By the terms of the second paragraph the client agrees to pay the attorney "one-half (1-2) of all that he may collect or recover by suit or compromise." Under the authorities above cited, this language does not create an "interest" in the subject of the agency or power but, on the contrary, evidences quite clearly the intention of the parties that the attorney shall have but a one-half interest in the "proceeds" derived from the exercise of the power. This, as we have shown, is insufficient to couple the agency or power with an interest. Under the provisions of its third paragraph, the agreement purports to "assign" to the attorney a one-half interest in the subject of the agency or power, but very definitely indicates that such purported assignment is made "as his compensation" for properly discharging the obligations of the agency or power conferred on him. Obviously, the attorney does not merit, nor is he entitled to, such compensation unless and until he has so discharged the responsibilities of the agency or power. This being so, the agency or power is exhausted and expended when, for the first time, he is entitled to his compensation for which the purported assignment was made. In other words, the agency or power, and the "interest" do not, and under the circumstances cannot, coexist. That is to say, they are not "coupled" within the meaning of the authorities. It is immaterial, therefore, that the agreement, as was also the situation in the case just above quoted from, employs language which when taken literally, and completely disassociated from other portions thereof, tends to give some support to respondent's conclusion. Our construction of the third paragraph of the agreement is consistent with, and tends to give effect to, the preceding paragraph wherein, as we have seen, the attorney is merely given an interest in the "proceeds" arising upon a discharge of the agency or power. This reasoning is likewise consistent with the final paragraph of the agreement wherein the attorney is authorized to "abandon said employment at any time by waiving compensation for his services." It can hardly be said that the language of the third paragraph assigns, or was intended to assign, a present, coexisting beneficial interest in the subject of the agency or power, within the meaning of the decisions, when the party claiming such assignment is free to abandon such agency or power, at his will, thereby waiving the "compensation" for which the asserted assignment was made.

The respondent refers us to certain language appearing in *Todd v. Superior Court*, supra, just above quoted from, to the effect that "the case would be quite different if, in addition to providing for reimbursements and compensation, the contract vested in the attorney in fact a definite share in the ownership of the legacies." That this language lends no support to respondent's theory in the present case is immediately apparent when it is read and considered in connection with the remainder of the decision in that case wherein, as already shown, it is declared that when the assignment "created a present interest in the legacies" only to the "extent of reimbursements and compensation," the agent's interest was not a "beneficial" one, and the agency or power was revocable.

In view of our conclusion, it is immaterial for present purposes that the petitioner seeks a substitution of attorneys for the purpose, as asserted by respondent, of dismissing the action therein pending to the alleged detriment of her counsel.

The demurrer is overruled, and the writ is made peremptory.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; THOMPSON, J.



2 Cal.2d 425

BETTANDORFF et al. v. CHRONISTER
et al.

Sac. 4846.

Supreme Court of California.

Feb. 14, 1935.

1. Pleading §129(2)

In action to set aside fraudulent conveyance, defendants' failure to deny allegation that execution was issued and levied against property of judgment debtor admitted that execution was regularly issued and levied, since every presumption must be indulged in favor of judgment.

2. Pleading §294

Verified complaint alleging issuance and levying of execution against property of both judgment debtors could not be denied on information and belief by defendants in action to set aside conveyances as fraud on creditors.

3. Fraudulent conveyances §227

Where defendants admitted return of execution unsatisfied as to both judgment debtors and action was tried on theory that both judgment debtors were execution proof, action to set aside as fraud on creditors separate conveyances of only one of judgment debtors could be maintained as against contention that remedy against other judgment debtor had not been exhausted.

4. Execution §16

Acceptance of bond, given to prevent levying of attachment, held not to have deprived attaching parties, subsequently obtaining judgment, of right to levy execution upon property of debtor giving bond (Code Civ. Proc. § 540).

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by J. W. Bettendorff and another against O. B. Chronister and Erma Chronister, who filed a cross-action, and others. From a judgment for plaintiffs, the named defendants and certain other defendants appeal.

Affirmed.

Hjelm & Hjelm, G. B. Hjelm, and Harold L. Hjelm, all of Turlock, for appellants.

Edward Bickmore and Stephen P. Galvin, both of Merced, for respondents.

SEAWELL, Justice.

For a better understanding of the issues involved in this appeal it is necessary to state briefly the facts which constitute its background. On February 17, 1932, plaintiffs Bettendorffs instituted an action against appellant O. B. Chronister (husband of Erma Chronister, also appellant herein) and E. L. Hill for the recovery of certain moneys alleged to be due upon contract. Upon the filing of the action an attachment was issued, and to prevent the levying of said attachment one Jack Hill and J. E. Brown executed a joint and several undertaking conditioned that if said O. B. Chronister should fail to pay the full amount of whatever sum might be recovered against him, they would pay the same. The case went to judgment on July 21, 1932, in favor of the Bettendorffs and against Chronister and E. L. Hill in the sum of \$1,147.46, and \$40.95 costs. On July 23, 1932, execution was issued against the property of defendants in said judgment and was returned satisfied to the extent of \$83.08. An alias execution was issued on November 23,

1932, which was returned partially satisfied to the extent of \$220.35, leaving an unpaid balance on said judgment in the sum of \$884.98, with interest from July 21, 1932.

Plaintiffs thereupon instituted this present action against the defendants Chronister and wife and Jack C. Mitchell to obtain a judgment setting aside a certain conveyance of real property made by said O. B. Chronister to his wife Erma, and also a certain mortgage of automobiles to said Mitchell, on the ground that said instruments were made for the purpose of delaying and defrauding plaintiffs, creditors of said O. B. Chronister, were without consideration, and were therefore void as to plaintiffs.

The action was dismissed as to Jack C. Mitchell. Judgment went for plaintiff on the issue of fraudulent transfer, and it is from this judgment that the appeal is taken. Erma Chronister was by said judgment enjoined from transferring or encumbering said real property and from collecting or in any manner disposing of the rentals arising therefrom. The judgment also directed that all moneys resulting from the rentals of said real property since the institution of the action over and above the rentals which were not theretofore applied to the satisfaction of a certain promissory note, the payment of which was secured by a deed of trust executed on said real property, be applied upon the payment of plaintiffs' judgment.

Negotiations for a settlement of the judgment followed its entry. On July 29, 1932, appellants herein applied for and were granted a stay of execution which continued until September 19, 1932, on which day it was vacated on motion of plaintiffs. On the 13th day of September, six days before the stay of execution expired, O. B. Chronister took steps to strip himself of all of his property, personal and real, by sale, deed, and mortgage. The wife during this period filed a homestead on the family residence, situate in the city of Merced, valued by the husband at \$4,000. He deeded to his wife his interest in the south half of lot No. 15, city of Merced, valued by him at \$13,000, encumbered with a trust deed to the extent of approximately \$3,200, and he gave notice of his intention to dispose of his meat market by sale to his wife, and other property. The values placed on the meat market by Chronister's witnesses varied widely, from \$4,000 to \$8,000. Upon sale it brought \$554. Another parcel or lot of land of small value, situate in the city of Fresno, was conveyed by Chronister to his sister in settlement of an alleged pre-existing

indebtedness incurred more than three years before the transfer was made. The consideration for this transfer was claimed to be on account of said sister paying his portion of the burial expenses of his mother. Four autotrucks used in the butcher business were mortgaged by him to Mr. Mitchell, his wife's sister's husband. The consideration therefor was claimed at the outset to have been the cancellation of a pre-existing indebtedness in the sum of \$3,000. An investigation of the account showed that said alleged indebtedness could not have exceeded \$1,000. This amount was accepted by Mr. Mitchell in full.

The consideration for the conveyance made to the wife was alleged to have consisted of moneys loaned her husband many years prior to the transfer sought to be invalidated, in two sums of \$1,000 each. One of said loans was made some eight years before the conveyance and the other nine years prior to the execution of said deed. No promissory note or memoranda was made evidencing the transaction, nor was any book of accounts produced showing its entry. The sum of \$3,500, which constituted the balance of said consideration, was computed upon salary which her husband claimed he agreed to pay her for services rendered as his clerk and bookkeeper, at the rate of \$5 per week for a portion of the period she was thus employed, and \$10 per week for the other period of employment. During her long services he had paid her but some \$700 on account at various times, of which he had no record. The husband alone testified to this arrangement and the wife gave no testimony on the subject. All of these transfers and attempted transfers of real and personal properties to the relatives of Mr. and Mrs. Chronister were consummated on the same day, to wit, September 13, 1932, and during the period when the stay of execution was operative in defendants' favor. During this period all bills payable to Mr. Chronister, aggregating approximately \$400, were assigned by him to the Board of Trade for the benefit of his creditors. If his sales and conveyances were permitted to stand for said alleged past indebtedness, the greater portion of which was barred by the statute of limitations, there would have been nothing left for the judgment creditors. The meat market which was noticed for sale by Chronister, together with his other property, and upon execution issued, was afterwards purchased by his landlord and by him transferred to Mrs. Mitchell, Chronister's sister-in-law, who continued to conduct the business. Chronister continued to run said business as her employee for a time thereafter.

Upon the foregoing facts the trial court found that said conveyances were made without any consideration passing from Erma Chronister to her husband, O. B. Chronister, and said conveyance sought to be set aside was made for the purpose of delaying and defrauding plaintiffs as creditors of O. B. Chronister, and that his wife accepted the conveyance with knowledge of the fraudulent intent of her grantor and with intent to assist him in the perpetration of said fraud. It further found that neither O. B. Chronister nor E. L. Hill, defendants' judgment debtors, had at the time said conveyance was executed, nor has either since had or possessed, any other property than that so conveyed, out of which execution could or can be satisfied in whole or in part, other than already partially satisfied, unless said real property, fraudulently conveyed, can be applied to the payment of said judgment and said indebtedness will remain as to the balance wholly unpaid; that the issuance of another or alias execution would be useless and of no effect for the reason that neither O. B. Chronister nor E. L. Hill has any property upon which an execution could be levied unless said conveyance be set aside; that the equitable title to said real property attempted to be conveyed remains in O. B. Chronister, subject to the lien of said trust deed in the sum of approximately \$3,000, and the moneys received as rentals thereon should be applied to the payment of the holder of the promissory note evidencing said deed of trust.

Said real property was ordered sold under the levy of a writ of execution to be issued in accordance with the court's order. Other appropriate orders were made by the court restraining the sale or incumbering of said property or rentals to the prejudice of the judgment creditors. The trial court was no doubt of the view that O. B. Chronister was not only contemplating insolvency, but was actually insolvent at the time all of the above-mentioned transfers and assignments were made; also that he intended to defeat the judgment creditors herein by conveying to relatives all of his property, real and personal, which was subject to execution, and that the alleged stale pre-existing indebtednesses, which were put forth as considerations, were but subterfuges to defeat said judgment. But one of the grantees appeared as a witness, Mrs. Chronister, and she offered no explanation of the alleged indebtedness of her husband to herself.

[1-3] Appellants contend that it is a necessary step in an action to set aside an alleged

fraudulent conveyance of real property that the judgment creditor allege and prove, in cases where there are two judgment debtors, that said judgment creditor has exhausted all legal remedies against both of said debtors. They therefore assert that there being no evidence in the record that the respondents made any effort to levy upon the assets of E. L. Hill, codefendant with Chronister, they cannot prevail in this action. This position is not tenable. The complaint alleges the issuance of two executions against the property of Chronister and E. L. Hill, and both were returned but partially satisfied. The answer admits that at least one execution was issued against the property of the defendants, which was returned partially satisfied. As to the second execution it is expressly admitted that it was issued against the property of Chronister and returned by the sheriff partially satisfied. There being no denial as to its issuance and levy against the property of Hill, it must be taken as an admission that execution was regularly issued and levied upon said judgment. Every presumption must be indulged in favor of and in support of a judgment. Every step taken in the issuance and levying of the execution is recorded in the record of the proceeding and imparts knowledge to appellants which cannot be denied on information and belief, as might be implied by appellants' denial of certain allegations of paragraph II of the verified complaint. It was not necessary, in view of the state of the pleadings, to prove the levying of execution on either of said parties. It appears by admission that execution was returned unsatisfied as to codefendant E. L. Hill as well as Chronister. Besides this, the case was tried on the theory that both Hill and Chronister were execution proof. The court so found. But what we have here said is not to be taken as holding that it was necessary to levy execution on Hill as a requisite to bringing the action to set aside a fraudulent conveyance executed by Chronister, to which transaction Hill was not a party.

[4] There is no merit in the contention that the execution of the undertaking by Brown and Hill to prevent the attachment of Chronister's property (section 540, Code Civ. Proc.) at the time the original action was filed, deprived appellants of the right to pursue Chronister's property on an execution issued on the judgment. The undertaking did not have the effect of taking away the right of execution on the judgment and substituting in place thereof a mere right to proceed

against the sureties who may or may not thereafter become insolvent. Such a rule as contended for would practically abrogate the most efficacious writ known to the law. The undertaking to prevent attachment may have the effect of releasing property actually attached or prevent the attachment of property in contemplation of attachment and give security for its return, or value if not returned to the attaching party, but it does not have the effect of depriving the judgment creditor of his right to levy an execution upon the property of his debtor wherever the same may be found.

The cross-action brought by appellants to quiet their title to the real property involved in this action necessarily falls with the judgment for plaintiffs.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; THOMPSON, J.



2 Cal.2d 460

**GLORIA ICE CREAM & MILK CO. v.
COWAN et al.**
Sac. 4799.

Supreme Court of California.
Feb. 20, 1935.

Rehearing Denied March 21, 1935.

Injunction §56

Where milk company's salesman who, during service on particular route, had acquired information including list of customers, allegedly deliberately and with intent to injure company's business left his employ and, using his information, solicited such customers for rival firm, milk company *held* entitled to injunction, though information was not trade secret and though route was a so-called wholesale route.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by the Gloria Ice Cream & Milk Company against Charles Cowan and others. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Rehearing denied; SEAWELL, J., dissenting.

Langdon & Tope and Joseph C. Tope, all of Stockton, and Pillsbury, Madison & Sutro, of San Francisco, for appellant.

Manuelita E. Aldecoa and Law T. Freitas, both of Stockton, for respondent.

WASTE, Chief Justice.

Plaintiff had, for many years, engaged in the business of buying, selling, delivering, and distributing milk, cream, and general dairy products by means of and over established trade routes. It employed the defendant Charles Cowan as a salesman and driver to deliver its dairy products over one of its routes on which there was an established and going trade list of customers for its commodities. Plaintiff paid Cowan a stipulated weekly wage, and for three years he continued to serve the customers of plaintiff, using plaintiff's equipment for the service. During the period of this service, Cowan secured a list of the customers of plaintiff along the route, and acquired other valuable information, alleged to be of a confidential nature, relating to plaintiff's business.

Cowan quit his employment with plaintiff, and, according to the charges of plaintiff, threatened and intended to enter the service of the defendant Black Milk Company, a concern engaged in the same line of business as the plaintiff, and in competition with plaintiff in the same community. Alleging that Cowan threatened to and would sell and deliver the dairy products of the Black Milk Company to the customers of plaintiff on the established route of plaintiff formerly served by him, and would serve, solicit, and sell to such customers, and otherwise make use of the information obtained by him while in the employ of plaintiff, plaintiff brought this action seeking to restrain defendants Cowan and the Black Milk Company from appropriating or endeavoring to appropriate patronage belonging to it, and to enjoin the defendants from soliciting or attempting to solicit the patronage of the customers of plaintiff along the trade route formerly served by Cowan. The cause was tried by the court sitting without a jury. At the conclusion of testimony for the plaintiff, judgment of nonsuit was granted, and plaintiff has appealed.

The cause going off on the motion for nonsuit, no findings were made, but it appears from the evidence that the regular route of plaintiff's customers served daily by Cowan was a "wholesale route," the customers consisting mostly of restaurants, bakeries, gro-

cery stores, markets, and similar concerns. The defendant Cowan delivered milk and cream to these places, collected for the amounts sold, attended to complaints, if any, made by the customers, and solicited new accounts. It is definitely shown by the evidence that, following the threats, Cowan did quit working for the plaintiff, and the next day began working for the rival firm, and for that firm served milk and cream to former customers of plaintiff, among others. Eleven or twelve customers quit plaintiff in one day.

We need not express our own views as to the conduct of the defendant Cowan in this matter. The trial court, in response to the motion for a nonsuit, said: "The Court is not deceived at all by the contention that the defendant [Cowan] did not solicit the patrons of the plaintiff in this case; I am satisfied that he did * * * and that he had solicited them, and * * * when he went around ahead of the Purity people's truck [the competitor of plaintiff], that he was steering them up against the patrons of the Gloria Company. The Court is not deceived in that at all * * * I think it was very reprehensible, unclean, unfair, and indecent for the defendant to be guilty of the acts he was guilty of here. He had a job, a regular job, and a permanent job, which he planned deliberately to give up in order that he might injure these people, the plaintiffs in the case. * * * In spite of such conclusion on the facts of the case thus expressed by the trial court, it took what we believe to be an erroneous view of the law applicable to the case, and granted the nonsuit. The reason for such action, as appears from the record and from the declarations of counsel in the briefs, was that the court was of the view that the authorities generally recognized as applying to cases of this sort are not applicable here solely because the route of plaintiff in question was a "wholesale route," as distinguished from a "retail route" on which "delivery is made at residences and homes." We do not so construe the cases.

The respondent, defendant below, urged upon the consideration of the lower court, and relies here, upon a decision of the District Court of Appeal in *Avocado Sales Co. v. Wyse*, 122 Cal. App. 627, 10 P.(2d) 485. In that case, on the trial court's findings, it was held that an injunction will not be granted at the instance of one engaged in the business of selling avocados to retailers, such as grocery stores, vegetable or fruit stands, clubs, hotels and cafés, to enjoin former employees subse-

quently engaging in the same business from soliciting business from such retailers to whom the former employer, through these former employees, sold avocados, where such retailers were solicited and sold to by other firms and individual dealers. In that case, according to the opinion of the District Court of Appeal [page 634 of 122 Cal. App., 10 P.(2d) 485, 488], the plaintiff was asking it to go further than any reported case had yet gone when it asked the court to say: "That a salesman for a wholesale concern calling upon well-known retail dealers to solicit orders and deliver goods for his employer and thereby making personal friends and acquiring a personal knowledge of his customers shall be, after the termination of such employment, debarred from dealing with the same customers for his own benefit." Assuming that in that case no confidential relation was violated, as indicated by the opinion of the District Court of Appeal, and no confidential information was misused, the decision of the District Court of Appeal in the case seems correct. In the case at bar, however, in the opinion of the trial court, the acts of the defendant Cowan, in which the other defendant (the Black Milk Company) participated, were done in carrying out a preconceived plan to injure the business of the plaintiff over a well-established route the plaintiff had built up.

The rule applicable to the kind of case here has been developed by the adjudication of the courts and by legislation looking toward the protection of the business world against unfair competition, and courts of equity stand ready to restrain such acts. Independent of any express contract between the parties, equity will restrain the acts of which plaintiff complains, and which the defendants threatened to do and which they were actually doing. *Empire Steam Laundry Co. v. Lozier*, 165 Cal. 95, 102, 130 P. 1180, 44 L. R. A. (N. S.) 1159, Ann. Cas. 1914C, 628. In that case this court affirmed the doctrine that an agent has no right to use materials obtained by him in the course of his employment and for his employer against the interests of that employer. "Such a use," the court said (page 100 of 165 Cal., 130 P. 1180, 1182), "is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligations to his principal." In *Pasadena Ice Co. v. Reeder*, 206 Cal. 697, 275 P. 944, 276 P. 995, this court again reviewed the authorities, and reaffirmed the doctrine laid down in the *Empire Steam Laundry Case*, supra. See, also, *Dairy Dale Co. v. Azevedo*, 211 Cal. 344, 295 P. 10. Other citation seems

unnecessary. We are satisfied to apply that doctrine as controlling in this case.

We may assume that the names of the customers of plaintiff on the milk route here in question, being restaurants, bakeries, markets, grocery stores, and like concerns, were listed in public directories and, therefore, under the facts of this case, were not "trade secrets," which seems to have been the situation in the *Avocado Sales Company Case*, supra, relied on by respondent, and which evidently led to the action of the trial court. But, eliminating from our consideration the list of customers of plaintiff formerly served by defendant Cowan, we still find in the record evidence that Cowan deliberately left the employ of plaintiff and as deliberately went about using whatever information he had acquired as its agent during years of service for the purpose of, and with intent of, injuring plaintiff's business. The defendant milk company participated with Cowan in such action. Equity will not tolerate such unfair tactics. The motion for a nonsuit should not have been granted.

The judgment is reversed.

We concur: THOMPSON, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.



4 Cal.App.2d 657

HIGBEY et al. v. ASSOCIATED ACCEPTANCE CORPORATION.

Civ. 8486.

District Court of Appeal, Second District,
Division 1, California.

Feb. 19, 1935.

1. Corporations ⇨118

Where corporate stock seller to which the sold stock was pledged as security for balance due wrote buyers that because of noncompliance with contracts seller declared buyers' right, title, and interest under the contracts void and payments forfeited, court's holding that contracts were not rescinded but terminated in accordance with their terms so as not to entitle buyers to recover payments made *held* not erroneous.

2. Corporations ⇨121(6)

In stock buyers' action against seller for money had and received because of seller's alleged rescission of contracts, court's holding that contracts were not rescinded but were terminated in accordance with their terms, and its general finding that all allegations in complaint inconsistent with fact findings were untrue and that allegations in answer were true, *held* sufficient findings on issue of rescission.

3. Trial ⇨388(2)

Where action for money had and received was submitted to trial court under stipulation covering agreed facts, it was unnecessary for court to make findings.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by G. W. Higbey and another against the Associated Acceptance Corporation. From an adverse judgment and an order denying a motion for a new trial, plaintiffs appeal.

Judgment affirmed, and appeal from the order dismissed.

George E. Cryer, of Los Angeles, for appellants.

E. P. Peers and Alfred Kehde, both of Los Angeles, for respondent.

YORK, Justice.

This is an appeal from a judgment rendered in an action for money had and received, in which the vendees of certain corporate stock seek to recover from their vendor the amount of partial payments made on three contracts for the purchase of the stock. The action was predicated upon the alleged rescission of the contracts by the vendor. Plaintiffs also appeal from an order denying their motion for a new trial.

The sole question between the parties here is whether or not the contracts were rescinded. None of the contracts was fully paid, but different amounts of cash were paid under each contract, and in each instance promissory notes, secured by a pledge of the stock, were given for the balance due. The same form of contract was used in each instance except as to dates and amounts.

The case really turns upon the correspondence between the parties with reference to the nonpayment of these notes and as to just what was meant by the letter of the defendant in which it was stated: " * * * We

will declare the amount you have paid forfeited, and your contracts at an end." Thereafter, defendant wrote plaintiffs another letter, in which it was stated: "Since you have wholly failed to comply with the terms of the contracts heretofore entered into between yourself and the undersigned relative to the purchase of certain stock by the undersigned for your account, you are hereby notified that the undersigned does by this notice declare all of your right, title and interest under and by virtue of said contracts void from this date, and further declare forfeited any amount which you have paid thereon in accordance with the terms of those contracts." To this letter plaintiffs replied as follows: "I agree to your action in cancelling and terminating my order and contract * * * but I do not agree that having terminated the contract you have either a moral or legal right to keep my money already paid on the order to purchase stock."

In its findings the court found that the sales occurred subsequent to May 26, 1931, which was the date of the last letter herein quoted received by plaintiffs from defendant. However, the record does not disclose any irregularity in the sales, and does disclose that the sale in each instance took place strictly in accordance with each and all of the provisions of the contracts under which the stock was held as collateral security.

[1-3] The principal objections made by appellants are that the court erred in failing to find on the issue of rescission; that the court erred in failing to find that the respondent did, on May 26, 1931, terminate and rescind the several contracts; that the court erred in its conclusion of law that appellants were not entitled to judgment against respondent, and that it should have ordered judgment for appellants; and that "the court erred in holding that the alleged sale of the pledged stock by respondent 'to itself,' 'without notice,' was valid."

These objections are not well taken, in that the court did make findings sufficient to cover the question of rescission, holding that the contracts were not rescinded, but that they were terminated in accordance with the terms of the contracts themselves. The case was submitted to the trial court under a stipulation covering the facts of the case, which would make it unnecessary for the court to make findings, since the agreed statement of facts would take the place of findings. Nevertheless, there is a general finding made by the

court "that all allegations in the complaint of plaintiffs herein inconsistent with the findings of fact herein are untrue; that all allegations in defendant's answer are true."

The judgment is affirmed, and the appeal from the order denying motion for new trial is dismissed.

We concur: CONREY, P. J.; HOUSER, J.



4 Cal.App.2d 586

SHOEMAKER v. SUPERIOR COURT IN
AND FOR LOS ANGELES COUNTY
et al.

BURROUGHS v. SAME.

Civ. 10128, 10130.

District Court of Appeal, Second District,
Division 2, California.

Feb. 14, 1935.

Hearing Denied by Supreme Court
April 15, 1935.

1. Dismissal and nonsuit ⇐60(2)

Denial of defendant's motion to dismiss action held not abuse of discretion under 1933 amendment changing running of five-year period within which case must be brought to trial from date of filing of complaint instead of from filing of answer, where motion was made 28 days before expiration of the 5-year period following filing of answer and more than 5 years from filing of complaint (Code Civ. Proc. § 583, as amended by St. 1933, p. 853).

2. Mandamus ⇐28

Mandamus does not lie to correct discretionary ruling of court of competent jurisdiction.

Application by Harlan Shoemaker for a writ of mandate to be directed to the Superior Court of the State of California in and for the County of Los Angeles, and Charles L. Bogue, Judge, to compel the dismissal of a certain action pending before such court, and application by E. R. Burroughs for a writ of prohibition to be addressed to the Superior Court of the State of California in and for the County of Los Angeles, and Parker Wood, Judge, to prohibit further proceedings in such action.

Alternate writ of mandate and writ of prohibition dismissed, and the proceedings quashed.

Charles L. Nichols, of Los Angeles, for petitioner Shoemaker.

Lawler & Degnan, of Los Angeles, for petitioner Burroughs.

Everett W. Mattoon, Fred M. Cross, and Roderick Johnston, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

On petitions for writ of mandate and writ of prohibition, respectively.

The above-entitled proceedings arise from the same source and were made returnable at the same time. It will be convenient to consider them together. An action was commenced in the superior court against petitioners and others on the 21st day of October, 1929. The answer of each petition in such suits was filed on or before December 8, 1930. The case had not been brought to trial on November 17, 1934, and the time for bringing the action to trial had not been extended by written or other stipulation. On the latter date petitioner Burroughs petitioned the court to dismiss the action under the provisions of section 583 of the Code of Civil Procedure, as amended by St. 1933, p. 853. The court thereafter denied the motion, and upon motion of the plaintiff therein the case was set for trial for November 26, 1934.

On November 22, 1934, petitioner Shoemaker, a defendant in the referred to superior court case, petitioned this court for an alternative writ of mandate and the same was granted, directing the respondent court to forthwith dismiss said action in accordance with the motion made under section 583, Code of Civil Procedure, as amended, or to show cause why it had not done so.

On November 26, 1934, petitioner Burroughs, also a defendant in said case, petitioned this court to issue its writ of prohibition against said court prohibiting it

from proceeding with the trial thereof until after the hearing and decision thereon of the said described petition of said Shoemaker in this court, and prays that the respondent court show cause why it should not be forever prohibited from proceeding with the trial of such referred to case. The writ and the order to show cause were issued.

We are now satisfied that the writs should never have been issued. It will be remembered that section 583, Code of Civil Procedure, until the amendment of 1933 (St. 1933, p. 853), which became effective August 21st of that year, provided that the court must dismiss an action that had not been brought to trial within five years from the filing of the answer; that the amendment referred to changed the running of the time from the date of filing the complaint instead of from the filing of the answer. Shoemaker's motion to dismiss was made 28 days before the expiration of the five years following the filing of the answer and more than five years from the filing of the complaint.

That the change made in section 583, Code of Civil Procedure, is retrospective was decided by *Coleman v. Superior Court*, 135 Cal. App. 74, 26 P.(2d) 673. That case also decided that, although the time for dismissal could be shortened by the amendment, the time for bringing the case to trial after the effective date of the amendment must be reasonable, all of the circumstances considered.

[1, 2] In the instant case the court considered the circumstances and under the exercise of its sound discretion denied the motion. Mandate cannot try the correctness of any discretionary ruling of a competent court made within its jurisdiction. *Kerr v. Superior Court*, 130 Cal. 183, 62 P. 479.

The alternative writ of mandate and the writ of prohibition heretofore issued are dismissed, further or any relief is denied, and the proceedings are quashed. *Fink v. Superior Court*, 105 Cal. App. 540, 288 P. 124.

We concur: CRAIL, J.; WILLIS, Justice pro tem.

POSWA v. BRITTAIN et al.

Civ. 9535.

District Court of Appeal, First District,
Division 2, California.

Feb. 14, 1935.

Hearing Denied by Supreme Court
April 15, 1935.**1. Attachment ⇐133**

Where original sureties of plaintiff in attachment fail to justify, justification of other sureties in their stead must be allowed, where other sureties are offered (Code Civ. Proc. § 1858, and § 539, as amended by St. 1933, p. 1859).

2. Attachment ⇐232

False swearing or fraud on part of plaintiff in attachment's surety is not ground for vacating attachment (Code Civ. Proc. § 539, as amended by St. 1933, p. 1859).

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by H. James Poswa against Frank Brittain and M. A. Carlon, individually and as copartners doing business under the firm name and style of Frank's Auto Supply, wherein a writ of attachment was issued. From an order discharging the writ of attachment, plaintiff appeals.

Reversed.

McCutchen, Olney, Mannon & Greene, of San Francisco, for appellant.

Laurence R. Chilcote, of Oakland, for respondents.

STURTEVANT, Justice.

This is an appeal from an order discharging an attachment. On February 7, 1934, the plaintiff, as assignee, commenced an action against the defendants to recover a judgment on an open book account. He took out a summons on the same day. When he filed his complaint he also filed an affidavit for attachment against alleged resident defendants. At the same time he delivered to the clerk a purported undertaking on attachment executed by two sureties. The clerk issued a writ of attachment which was served on the same day. The defendants excepted to the sureties. The plaintiff then served a notice that the sureties would justify before the trial court on February 21, 1934. At that time all of the parties attended. Before the examination of the sureties was taken up the attorney for the plaintiff announced that he had another undertaking, the sureties on which were ready

to justify if the sureties on the first one could not. The court stated that the hearing of the justification of the original sureties should first be taken up. The hearing so proceeded. The original sureties failed to justify. The defendant asked that the attachment be discharged and claimed that the original undertaking was a fraud on the clerk of the court. As to accepting the new undertaking the court expressed its doubt as to whether it could be accepted "because the attachment issued on the original undertaking and the new undertaking would not secure anything that happened before the writing of it." However, it was stipulated that the new bond was acceptable if the plaintiff had a right to file it. The latter was a corporate bond dated February 19, 1934, which contained nothing on its face showing that it would relate back to the commencement of the action. The further hearing was continued until February 23, 1934. On that date another corporate undertaking containing an express provision relating back to the commencement of the action was delivered to the judge presiding and the further hearing was continued until February 26, 1934. On that date the court made the order appealed from. The clerk entered the order as based "on the ground of the insufficiency of the bond on file." On March 28, 1934, the court, in the absence of and without notice to the plaintiff, entered a nunc pro tunc order that its minutes be so amended as to recite "that the attachment be and the same is hereby dissolved on the ground of fraud upon the clerk of this court. * * *

[1] The plaintiff contends that the trial court had no power to vacate the attachment, but that it was its duty to accept the substitute undertakings. He asserts that attachment proceedings are a special statutory remedy and as such are solely dependent on and controlled by the provisions of the statute. Continuing, he claims that the trial court should have accepted the substitute undertakings and should have denied the motion to vacate. Code Civ. Proc. § 539, as amended by St. 1933, p. 1859. In so far as pertinent to this decision, that section provides: "When excepted to, the plaintiff's sureties, within five days from service of written notice of exception, upon notice to the defendant of not less than two nor more than five days, must justify before the judge, justice, or clerk of the court in which the action is pending, in the same manner as upon bail on arrest; and upon failure to justify, or if others in their place fail to justify, at the time and place appoint-

ed, the writ of attachment must be vacated." The defendants reply that the original undertaking was "a nullity"—it was a "straw bond." They cite *Fairbanks, Morse & Co. v. Getchell*, 13 Cal. App. 458, 110 P. 331, and *Alexander v. Superior Court*, 91 Cal. App. 312, 266 P. 993. Neither case is in point. Each of those cases was a proceeding before "the court" commenced under Code of Civil Procedure, § 556. Neither was addressed to proceedings before "the judge" or "the clerk" under section 539. When the attack is made under the latter section and it transpires that the sureties are insufficient, the statute prescribes the procedure—the justification of other sureties in their place if offered. That course must be followed. To hold otherwise is to read out of the statute the entire clause " * * * or if others in their place fail to justify. * * * " To so read the statute is to do violence to fundamental law. Code Civ. Proc. § 1858.

[2] As noted above, the nunc pro tunc order recited that the attachment was discharged because the sureties committed a fraud on the clerk. The plaintiff contends that the said recital is not supported by the evidence and furthermore, if it were, the trial court had no power to punish such acts of the sureties by penalizing the plaintiff. We think both contentions must be sustained. There was no evidence of fraud on the part of the plaintiff and the trial court did not find to the contrary. That the sureties made false affidavits, when executing the undertaking, that such acts are at all times reprehensible, and in the instant case, particularly so, will be at once conceded. There is authority to the effect that the offender in appropriate proceedings may be disciplined. 13 C. J. 20. But counsel have not cited to us a single authority to the effect that false swearing or fraud on the part of a surety is ground for vacating an attachment. Our statute does not so provide and we have no power to read into it words that are wholly absent.

As stated, the defendants contend that if, as in the instant case, the original sureties fail to justify and from their examination it appears that their affidavits attached to the attachment undertaking contain false valuations on the assets of the sureties, such fact is sufficient ground to hold the undertaking "a nullity"—"a straw bond." Where is the border line? If the variance is slight would they so contend? They seem to appreciate where the contention leads. Referring to

Code of Civil Procedure, § 539, as amended, they say: "We submit that the correct rule should be that if the surety has property in the sum named in the undertaking, but, on a hearing for the purpose of justification it develops that the property is of such character or so encumbered that he is not acceptable because of the uncertainty of his ability to satisfy a judgment on the undertaking, then plaintiff should be allowed to qualify a substitute who will be acceptable." They cite no authority. To uphold that contention would be to rewrite the statute. That power rests with the legislature and not with the courts.

The plaintiff also contends that he had the right to amend his undertaking. Code Civ. Proc. § 558; *Hamburger v. Halpern*, 28 Cal. App. 317, 152 P. 61. In view of the conclusions we have reached as to the construction of section 539, Code of Civil Procedure, as amended, we do not find it necessary to discuss the contention last mentioned.

The order discharging the writ of attachment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.



4 Cal.App.2d 394

**BRIGHTMAN v. BOARD OF EDUCATION
OF CITY OF BERKELEY et al.**

Civ. 9509.

District Court of Appeal, First District,
Division 2, California.

Feb. 5, 1935.

Hearing Denied by Supreme Court
April 5, 1935.

1. Schools and school districts ☞141(1)

In determining whether teacher was permanent employee within statute regulating dismissal, although school districts had same boundaries and governing board, teacher's employment by each district must be considered apart from employment by other district (School Code, §§ 5.500, 5.681, 5.710).

2. Schools and school districts ☞133

Under teachers' tenure law, status of permanent employee must be acquired in some particular school district (School Code, § 5.500).

3. Schools and school districts ☞133

Teacher, even if having status of permanent employee of particular school district,

waived rights by accepting employment with another district (School Code, § 5.500).

4. Schools and school districts *↪*141(2)

In determining whether teacher, as regards dismissal, was permanent employee of school district, employment during particular school year, during which teacher served for less than 75 per cent. of school days, could not be counted under statute, and hence teacher, though employed for three consecutive years, was not permanent employee because she was not re-elected for succeeding year as contemplated by statute (School Code, §§ 5.500, 5.503, 5.681, 5.710).

5. Schools and school districts *↪*133

Rights of permanent employee of school district may be acquired and retained only in manner and to extent provided by law, as regards dismissal (School Code, §§ 5.500, 5.503, 5.710).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Petition by Winifred Brightman and Georgia Bliss for a writ of mandate against the Board of Education of the City of Berkeley and the members thereof, to compel respondents to reinstate petitioners and permit them to serve as permanent teachers. From a judgment for respondents, petitioners appealed, and the last-named petitioner subsequently dismissed her appeal.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Lemuel D. Sanderson, of San Francisco, for appellant.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Agnes R. Polsdorfer and T. A. Westphal, Jr., Deputy Dist. Attys., all of Oakland, for respondents.

SPENCE, Justice.

A petition was filed in the superior court by Georgia Bliss and Winifred Brightman seeking a writ of mandate to compel the respondents to reinstate them and permit them to serve as "permanent teachers." The respondents answered and a trial was had which resulted in a judgment in favor of respondents. An appeal was taken by said petitioners from said judgment, but the petitioner Georgia Bliss has since dismissed her appeal, leaving Winifred Brightman as the sole appellant.

The respondent Board of Education of the City of Berkeley constitutes the governing board of both the Berkeley School District and the Berkeley High School District. Said

districts are public corporations and the boundaries of each coincide with the boundaries of the city of Berkeley. Appellant's previous service in the Berkeley School District and in the Berkeley High School District will be hereinafter set forth. During the school year 1931-1932 appellant was employed by the Berkeley School District and acted as a traveling teacher of instrumental music for several of the elementary schools of that district. On April 25, 1932, the board adopted a resolution which recited "that economies must be effected wherever possible, and that all employees holding the position of Travelling Teacher of Music be dismissed." Pursuant to said resolution, appellant was duly notified of said dismissal by registered letter mailed on April 29, 1932.

Two main issues were presented to the trial court: First, was appellant at the time of her dismissal a "permanent employee" of either the Berkeley School District or the Berkeley High School District or was she merely a "probationary employee" who might be dismissed under section 5.681 of the School Code; second, if appellant was a "permanent employee," was the dismissal proper under section 5.710 of the School Code relating to dismissals because of the discontinuance of a particular kind of service? The trial court found against appellant on both of these issues, and if its findings on either issue may be sustained, the judgment must be affirmed.

[1, 2] In our opinion, the trial court's findings to the effect that appellant was not at the time of her dismissal a "permanent employee" of either the Berkeley School District or the Berkeley High School District, but was merely a "probationary employee" of the Berkeley School District, were sustained by the evidence. It is conceded that appellant had never been classified as a "permanent employee" in either district, and it is therefore necessary to examine the record of her service in order to determine whether she automatically became under the law a "permanent employee" of either district by reason of such service. In so examining the record of her service, her employment by each of said districts must be considered apart from her employment by the other district. Although said districts were both governed by the Board of Education of the City of Berkeley, they were as separate and distinct entities "as though the two were in separate cities and governed by separate boards." *McKee v. Edgar*, 137 Cal. App. 462, 30 P.(2d) 999, 1001; *Gould v. Santa Ana High School District*, 131 Cal. App. 345, 21 P.(2d) 623. It is entirely

clear from a reading of section 5.500 of the School Code and the authorities cited that the tenure law relates to "the district" and that the status of "permanent employee" must be acquired in some particular district. It is also clear that successive periods of service in two separate districts cannot be combined for the purpose of computing the length of service in either district.

[3, 4] We need not set out at length appellant's record of service in the Berkeley High School District. Her employment by that district ceased at the end of the school year 1928-1929. Thereafter she was employed exclusively in the elementary schools of the Berkeley School District and her compensation was paid entirely by that district. Assuming without deciding that appellant's previous service in the Berkeley High School District was such that she might at one time have claimed the status of a "permanent employee" of that district, she nevertheless waived any rights which she might have previously had by virtue of such service when she voluntarily ceased her employment with that district and accepted employment with the Berkeley School District in 1929. *McKee v. Edgar*, *supra*. See, also, *Montgomery v. Board of Education*, etc., 137 Cal. App. 668, 31 P.(2d) 243. We therefore conclude that appellant was not a "permanent employee" of the Berkeley High School District at the time of her dismissal from the Berkeley School District in 1932.

Turning now to appellant's service in the Berkeley School District, we find that she was first employed by said district for 74 school days of the first term of the school year 1928-1929. In the second term of that school year, she was employed exclusively by the Berkeley High School District. The record shows that during that year she served in the Berkeley School District for less than 50 per cent. of the number of days on which the schools of that district were maintained. Thereafter she was employed by the Berkeley School District during the school years 1929-1930, 1930-1931, and 1931-1932. She was not re-elected for the following school year, but was given notice of dismissal in April, 1932, as above stated.

The sections of the School Code applicable to appellant's service in the Berkeley School District were amended in 1931. Section 5.500, as added by St. 1931, p. 1394, read as follows: "Every employee of a school district of any type or class, who after having been employed by the district for three complete consecutive school years in a position, or positions, requiring certification qualifications, is

reelected for the next succeeding school year to a position requiring certification qualifications shall, except as hereinafter otherwise provided, at the commencement of said succeeding school year, be classified as and shall become a permanent employee of the district." Section 5.503, as added by St. 1931, p. 1395, then read: "A probationary employee who in any one school year has served for at least seventy-five per cent of the number of days the schools of the district in which such employee is employed are maintained shall be deemed to have served a complete school year."

Appellant's service in the Berkeley School District during the school year 1928-1929 may not be counted for the purposes under discussion for two reasons: First, appellant did not serve that district for a sufficient number of days during the school year 1928-1929 to constitute a "complete school year" as defined in said section 5.503; and, second, she ceased her employment with that district at the end of the first term and accepted employment with the Berkeley High School District for the second term of that year. Therefore the only years which might be counted by appellant toward the acquisition of the status of a "permanent employee" in the Berkeley School District were the years 1929-1930, 1930-1931, 1931-1932. But appellant was not "reelected for the next succeeding school year." Section 5.500. On the contrary, she was dismissed in April, 1932. We therefore conclude that appellant was not a "permanent employee" but a "probationary employee" of the Berkeley School District at the time of her dismissal, and that her dismissal as such "probationary employee" was authorized by the provisions of section 5.681 of the School Code.

[5] In view of the conclusions above set forth, it appears unnecessary to discuss the second issue raised in trial court. But as appellant points to her service over a period of several years in the two districts and apparently questions the good faith of the board in dismissing her in 1932, we may briefly state the situation as it appears from the record before us. The period during which appellant served seems to have been the experimental period for the teaching of instrumental music in the schools. Appellant was authorized by her certificate to teach only the limited subjects of "violin, orchestral music and harmony." At first she and others taught under what was known as the "25 cent plan." During that time she was not employed by either district but was merely allowed to teach groups of pupils at the various schools

and was compensated by the payment by each pupil of 25 cents per lesson. Later she was employed by the Berkeley High School District and thereafter by the Berkeley School District and acted as a traveling teacher of instrumental music. It does not appear that the teaching of instrumental music was ever a part of the regular curriculum of the schools of either district during the time which appellant served. The taking of this instruction was optional on the part of the pupils, and those who desired to take the lessons were merely permitted to withdraw from their regular classes for the time required. The traveling music teachers did not attend the meetings of the classroom teachers; they did not keep a state teachers' register nor did they turn in attendance records of the pupils instructed by them; they did not grade the pupils as did the classroom teachers and the pupils received no grades on their report cards for this work. When the "25 cent plan" was abandoned and appellant was first employed by the Berkeley High School District, she taught only one-half day per week. Later she was employed one day per week, then three days per week, and ultimately on a full-time basis. At the time of appellant's dismissal, the teaching of instrumental music in the elementary schools of the Berkeley School District in which she was teaching was discontinued entirely, but such teaching was continued in the junior high schools of the Berkeley High School District under teachers who were regularly assigned to each of such schools and did not travel from school to school. Appellant's real complaint rests in the fact that one or more men teachers of instrumental music, who were serving in the Berkeley High School District and were retained by that district after appellant's dismissal by the Berkeley School District, had served in the Berkeley High School District for a shorter period of time than appellant had served in both districts. It does not appear, however, that said Board of Education acted other than in good faith, for it is reasonable to assume that their experience during this experimental period had led them to believe that the men who were then employed by the Berkeley High School District could more satisfactorily handle the teaching of instrumental music together with the organization of orchestras and bands in the junior high schools than could the women who had been previously employed by the Berkeley High School District.

We have set forth the foregoing facts for the reason that appellant seems to treat the

respondents' acts as an unjustifiable assault upon the spirit and letter of the so-called teachers' tenure provisions. We do not so view it. The rights of a "permanent employee" of a school district may be acquired and retained only in the manner and to the extent provided by law. In the present case, it is doubtful whether service of the nature and for the period rendered by appellant for the Berkeley High School District was sufficient under the law prior to the amendment of 1931 to give her the status of a permanent employee in that district at any time. It would have been clearly insufficient under the clarifying language of section 5.503 as amended in 1931 for there was but one year, to wit, the school year 1927-1928, during which appellant served that district for as much as 75 per cent. of the number of days that the schools of said district were maintained. In any event, as above indicated, if appellant ever acquired the status of a "permanent employee" of the Berkeley High School District, she waived her rights as such in 1929 when she left the employ of said district and entered the employ of the Berkeley School District. Furthermore, she never acquired the status of a "permanent employee" of the Berkeley School District for the reasons hereinabove set forth.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



4 Cal.App.2d 503
GALLICHOTTE v. CALIFORNIA MUT.
BUILDING & LOAN ASS'N et al.
Civ. 9390.

District Court of Appeal, First District,
Division 1, California.

Feb. 13, 1935.

Rehearing Denied March 15, 1935.

Hearing Denied by Supreme Court
April 11, 1935.

1. Negligence ⚡6

Violation of ordinance is negligence per se.

2. Negligence ⚡6

Fact which will excuse technical violation of statute or ordinance from constituting negligence must result from causes or things beyond control of person charged with violation.

3. Negligence ⇨121(4)

Burning of grass and weeds on vacant lot in violation of ordinance, resulting in destruction of property on adjoining land, was conclusively presumed negligent, though more than ordinary precaution was exercised in protecting adjoining property before starting fire and in attending fire to prevent spread to other property, where violation of ordinance was deliberate and not result of cause beyond defendants' control.

4. Negligence ⇨121(5)

Burden of proof that defendants' negligence was proximate cause of plaintiff's injury is on plaintiff.

5. Negligence ⇨134(11)

In proving proximate cause, law does not require demonstration or absolute certainty (Code Civ. Proc. § 1826).

6. Negligence ⇨136(25)

Where only one conclusion can reasonably be drawn from facts, question of proximate cause becomes one of law.

7. Negligence ⇨134(11)

Evidence held to show as matter of law that defendants' negligence in burning grass and weeds on vacant lot was proximate cause of destruction of plaintiff's property on adjoining land.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Bud Gallichotte against the California Mutual Building & Loan Association and others. From a judgment for defendants, plaintiff appeals.

Reversed.

Percy V. Long, Bert W. Levit, William H. Levit, and George H. Hauerken, all of San Francisco, for appellant.

Bohnett, Hill & Cottrell, of San Jose, for respondents.

Held, Justice pro tem.

The plaintiff and appellant, the owner of an automobile, certain household furniture, and also of miscellaneous painter's equipment, supplies and apparatus, insured such property against loss by fire. Subsequently, the insured property was in part destroyed by fire, and the insurers paid to plaintiff the loss thereby occasioned to him. Following sufficient assignments, this action was instituted by plaintiff to recover on behalf of the insurers the amount paid plaintiff under the several policies covering the property destroyed.

The plaintiff is the owner of a lot in the city of San Jose, on which lot was situated a dwelling house, garage and paint shop. The property destroyed by fire was contained in these several buildings. The defendant California Mutual Building & Loan Association, a corporation, at the time of the fire referred to was the owner of a vacant lot situated to the southwest of and adjoining plaintiff's property. The defendants Howard and Pilgram were employees of the California Mutual Building & Loan Association, and on June 9, 1932, were assigned by their employer to the task of burning the weeds growing on the vacant lot of the defendant association. While these employees were so engaged, a fire was discovered on the adjoining premises of plaintiff, and this fire caused the damage sued for herein.

The complaint here is in two counts. The first charges that defendants negligently set a fire, and negligently allowed it to spread to the premises of plaintiff, with the resultant destruction of plaintiff's property. The second count pleads an ordinance of the city of San Jose which makes it unlawful to burn "refuse" at any place within the city limits. The definition of "refuse" is sufficiently extensive to cover the grass which was burned by defendants. Defendants admit the setting of the fire by them on the lot of the association and deny the other material allegations of the complaint. The trial court found that at the time of the setting of the fire by defendants, an ordinance in terms as pleaded in the complaint was in full force and effect, and that at said time there was located on the lot of defendant association a large quantity of dry grass and dry weeds. The court, however, found that the fire started by defendants did not extend or spread to plaintiff's property. There are also findings that defendants exercised more than ordinary precaution in protecting adjoining property before starting the fire, and in attending the fire to prevent its spread to other property; and also that plaintiff's property was not burned or damaged or destroyed as the proximate result of the fire started by defendants.

[1] Judgment herein was in favor of defendants. Plaintiff appeals and contends that a finding of lack of negligence on the part of defendants, and the exercise of care by them, is immaterial in view of the admitted fact that defendants violated the ordinance set up in the complaint. The violation of an ordinance is negligence per se. In *Alechoff v. Los Angeles Gas & Electric Corp.*, 84 Cal. App. 33, 39, 257 P. 569, 571, it is said:

"It is an axiomatic truth, that every person while violating an express statute is a wrongdoer, and as such is ex necessitate negligent in the eye of the law." An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by a showing that the act was justifiable or excusable under the circumstances. Until so rebutted, it is conclusive. *Mora v. Favilla*, 186 Cal. 199, 202, 199 P. 17; *Rath v. Bankston*, 101 Cal. App. 274, 281, 281 P. 1081.

In *Berkovitz v. American River Gravel Co.*, 191 Cal. 195, 215 P. 675, 677, there is quoted with approval the following from *Shearman & Redfield on Negligence*: "The only question remaining open on this point is whether conclusive proof of the violation of such a statute or ordinance is also conclusive proof of negligence. Some courts have held that it is, and some that it is not. * * * The violation of such a law left without explanation or excuse, is conclusive of negligence, but it may be excused. * * * If some good excuse appears which would be a sufficient defense to an action for the penalty imposed by the law * * * then the law is not really violated."

In *Berkovitz v. American River Gravel Co.*, supra, it was held that the fact that a tail-light on a motortruck was burning at a time when the vehicle was three or four blocks distant from the place of the accident, might furnish an excuse for a violation of the statute requiring such light to be burning at all times while the vehicle was on a public highway.

[2] It is well settled that the fact which will excuse a technical violation of a statute or ordinance must result from causes or things beyond the control of the person charged with the violation. 45 Cor. Jur. p. 731, § 121.

In *Kelley v. Anderson*, 15 S. D. 107, 87 N. W. 579, 580, it was said: "It being shown by the evidence that the fires were set in one of the months in which fires upon stubble lands are prohibited. * * * The evidence * * * tending to prove that there was no negligence on the part of the defendant in setting his straw stacks on fire at that season of the year, in view of the fact that the ground was wet, and in places covered with snow, was inadmissible."

[3, 4] Evidence of due care on the part of the defendants does not furnish an excuse or justification for the negligence presumed to arise on proof of violation of the ordinance. No attempt was made here on the trial to

show any excuse or justification. The violation was a deliberate one, and not the result of a cause beyond the control of defendants. The presumption of negligence is, therefore, conclusive in this case. Negligence of defendants having been established, still they cannot be held liable unless such negligence was the proximate cause of the injury to plaintiff, and the burden of proof in this regard is on plaintiff. As was said in *County of Alameda v. Tieslau*, 44 Cal. App. 332, 337, 186 P. 398, 400: "By proving the defendants' negligence without in some way fastening that negligence to the injury, a case is not made out." But as was also said there: "These rules, however, do not require demonstration of the connection between the proved or admitted negligence and the resultant injury. It is not necessary that an eyewitness be produced to testify directly to the fact." The rule is expressed in our statutes in section 1826, Code of Civil Procedure, and applied in *Bethlehem Corp. v. Industrial Accident Commission*, 181 Cal. 500, 502, 185 P. 179, 7 A. L. R. 1180.

It is admitted that at about 1 o'clock p. m. on June 9, 1932, respondent employees set fire to a quantity of dry grass situated on the vacant lot of respondent association. There is testimony in the record that a few days previously the grass and weeds in the center of the lot were cut down by a mowing machine, but allowed to remain on the premises. There is also testimony that the fringe of grass and weeds on the outer edge of the lot was in part wet down and in part cut with a hand scythe in the forenoon of June 9th. The fire was set by respondent employees at a point on the vacant lot about ninety feet southerly from the south line of the premises of plaintiff. Respondent Howard, who was in charge of the work for his employer, the respondent association, testified that at the time the fire was started the wind was blowing from the northwest, and the records of the United States Weather Bureau show the velocity of the wind between 1 p. m. and 3 p. m. of that day to have been from ten to twelve miles per hour. Howard testified also that it would require about two hours to burn over the vacant lot, and that plaintiff's property was on fire forty-five minutes after the fire was started on the vacant lot. He was asked: "Q. Of course the fire spread over towards Mr. Gallichotte's property after it left the corner, didn't it?" His answer was in the affirmative, and he stated also that the fire "crept over towards the paint shed." After Howard discovered that plaintiff's property was on fire, the grass on the vacant lot was still burning.

The witness Bravo arrived at the scene after appellant's property was on fire, and he testified that the "whole field was afire"; that there were flames and smoke in the vicinity of appellant's buildings, and that these buildings were burning at the time; that "there was fire and smoke all around the lot and among the buildings in that vicinity." A number of witnesses testified that the grass on the vacant lot and immediately adjacent to the buildings of appellant was burned. The assistant chief of the San Jose Fire Department was present at the scene, and testified that when he arrived the fire and smoke "seemed to be all over the lot," and the fire was "still smoldering all over the lot." At that time the buildings of appellant were entirely in flames. This witness, with an experience in the fire department of twenty-five years, was asked the following questions and gave answers as follows:

"Q. Is there any doubt in your mind as to where the fire on Mr. Gallichotte's property started from? * * * A. I can't tell you what started it; if you want what I think started it, I can tell you.

"Q. That is what I want, just your guess? A. Well, it was started by that grass fire, your Honor, that is my opinion. * * *

"Q. That is purely a guess, and that is all? A. Just as I told you; it is not impossible that it would start some other way, but it would be very improbable owing to the conditions that day and that a grass fire was burning there and the looks of the fence. All things considered I would guess and say that it started from the grass fire."

We have here an experienced man, in possession of the facts as to the conditions existing at the time. He makes the deduction that the fire which destroyed the buildings of plaintiff found its origin in the fire which was set within less than an hour before by the respondent employees, within a distance of one hundred feet.

[5] It is true that no one actually saw the contact that produced the fire on the premises of appellant, but the rule, as we have stated, is that the law does not require demonstration or absolute certainty, because such proof is rarely possible. This rule has found application in cases like the present one. *Paiva v. California Door Co.*, 75 Cal. App. 323, 242 P. 887; *Kennedy v. Minarets & Western Ry. Co.*, 90 Cal. App. 563, 266 P. 353; *Viera v. Atchison, etc., Ry. Co.*, 10 Cal. App. 267, 101 P. 690; *Dibble v. San Joaquin L. & P. Corp.*, 47 Cal. App. 112, 190 P. 198.

[6, 7] Not only is the inference that the fire set by respondent employees spread to the premises of appellant a logical and reasonable one, deducible from the proven facts, but it would seem to be the only one that could reasonably be drawn from those facts. And thus the question of proximate cause becomes one of law. *Traylen v. Citraro*, 112 Cal. App. 172, 297 P. 649; 45 Cor. Jur. 1321; Restatement of the Law of Torts (American Law Institute) § 434. There is here no question of conflict of evidence, for it would seem that the most favorable view that might be taken of the evidence adduced in behalf of defendants leads to but one conclusion, viz., that the fire which caused the damage for which recovery is sought herein spread to the premises of plaintiff from the fire set by respondent employees on the vacant lot of respondent association. The trial court therefore erred in its conclusion to the contrary.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.



4 Cal.App.2d 680
CALIFORNIA MACHINERY & SUPPLY
 CO., Limited, v. **UNIVERSITY CITY**
SYNDICATE, Inc., Limited, et al.
 Civ. 9829.

District Court of Appeal, Second District,
 Division 2, California.

Feb. 20, 1935.

Hearing Denied by Supreme Court
 April 18, 1935.

1. Replevin ⇨(4)

Replevin lies where plaintiff has general or special property in goods, and his right to immediate possession thereof is disputed by defendant.

2. Mines and minerals ⇨93

Lessor, after termination of oil lease, was not under duty to comply with oil inspector's order which required that oil well, drilled by lessee, be capped before drilling equipment bought by lessee under conditional sales contract and left on land could be removed, or to deliver such equipment to conditional seller (Gen. Laws 1931, Act 4916, §§ 16, 16a).

3. Sales ⇨479(7)

Replevin by conditional seller held not to lie against lessor to recover drilling equip-

ment purchased by lessee and left on land when oil lease was terminated in absence of proof that lessor refused to permit seller to retake property or to enter real property for purpose of complying with oil inspector's order which required that well be capped before equipment could be removed (Gen. Laws 1931, Act 4916, §§ 16, 16a).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the California Machinery & Supply Company, Limited, against the University City Syndicate, Inc., Limited, and another. From a judgment in favor of plaintiff, defendants appeal.

Reversed and remanded with directions.

Ben S. Hunter, Brown, Bissell & Beery, and F. Walton Brown, all of Los Angeles, for appellants.

Harold F. Clary, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

This cause is before us on an appeal from a second and modified judgment based on modified findings and conclusions. Appeals from the first judgment entered in the trial court and from orders changing and adding to the findings, conclusions, and judgment have been heretofore dismissed. (Cal. App.) 39 P.(2d) 853.

The action is one for possession of personal property, the complaint being couched in the conventional form, with prayer for possession or the alternative of value and for damages for detention. The complaint charges that plaintiff is the owner and entitled to the possession of certain personal property and that defendants "wrongfully and without plaintiff's consent, took possession of the said property * * * and have withheld and now withhold and detain the said property from plaintiff's possession"; that on July 2, 1932, "plaintiff demanded the delivery of the above described property but that the defendants have at all times since said date failed and refused to deliver the said property to the plaintiff." The answers of defendants consist of denials only. The court found the above-quoted allegations to be true and ordered judgment for possession or for the value in the sum of \$4,000 in case delivery cannot be had, and for the further sum of \$6,975 damages for unlawful detention, from which judgment this appeal is taken.

A brief statement of the pertinent and undisputed facts is necessary to determination

of the contention made herein by appellant that the evidence is insufficient to sustain such findings and judgment.

On January 30, 1931, plaintiff delivered to one Bogumill under a "conditional agreement of sale" certain oil well drilling equipment a portion of which is the subject of this action. Bogumill was at the time lessee under an oil lease of certain real property, the ownership of which real property and the lessor's interest in the oil lease thereon came by transfer to defendants about May 11, 1931. On April 21, 1931, Bogumill assigned to plaintiff his leasehold interest in one parcel of the whole leasehold, but not the parcel on which the oil well herein referred to was located, as additional security on the sales contract. Bogumill, after using the equipment in drilling for a time on the leasehold, defaulted in his payments on the sales agreement, and in July of 1931 plaintiff, in accordance with the terms thereof, began to retake possession of and remove the equipment, and had removed all except that described in the complaint herein when plaintiff was ordered by a supervisor of the division of oil and gas of the state of California to stop such removal. On July 27, 1931, plaintiff's attorney notified the division of oil and gas in writing of its intention to remove the balance of this equipment and requested a written consent. To this request the division replied in writing that when plaintiff gave it notice of intention to do the work specified in the writing an approval would be given for removal. The work required was to remove the drill pipe to a depth of 540 feet and to place a solid cement plug in the well from 540 feet to 500 feet, and to cap the 14-inch conductor casing at the surface and leave it full of heavy fluid.

On April 11, 1932, a decree quieting title in defendant Bank of America to the real property covered by the lease against the leasehold claims of the former lessee and this plaintiff, among many others, was entered. On July 2, 1932, plaintiff by its attorney sent a letter to defendant University City Syndicate, reciting that plaintiff was the owner of the equipment described in the complaint herein; that it understood that the Bogumill lease had been canceled; and that defendant had retaken possession of the property. The letter then proceeded thus: "On behalf of the California Machinery & Supply Company, Ltd., I hereby make demand upon you for the immediate delivery of this equipment. I wish to advise you that the Commissioner of Oil and Gas has heretofore refused to allow us to remove this equipment by reason of the fact

that gas is escaping from the well and that the same must be properly abandoned. I wish further to advise you that we will look to you to get the proper release from the Commissioner of Oil and Gas and immediately deliver this property to California Machinery and Supply Company, Ltd." On July 5, 1932, defendant University City Syndicate replied to this letter stating in substance that the matter mentioned therein had been referred to its attorney and that he would take the matter up in due course. On July 11, 1932, the attorney for said defendant sent a letter to plaintiff's attorney stating that the matter had been referred to him and that he would be glad to discuss the situation at convenience. On September 1, 1932, plaintiff's attorney again wrote to the defendant, saying nothing had been done relative to the delivery of the equipment to plaintiff and suggesting that prompt attention be given to the matter. This letter was referred to defendant's attorney on September 2, 1932, and on September 29, 1932, the complaint in this action was filed.

From the foregoing history of the case, it is quite apparent that there is no evidence to support the finding that defendants, on or about April 12, 1932 (the date of quiet title decree), wrongfully and without plaintiff's consent took from plaintiff's possession the said property, and had ever since withheld possession against its will. The only possession in defendants of any property shown by the evidence is the constructive possession of the real property on which the well and this equipment was located, resulting from the transfer of title and the quiet title decree. Nor is there any allegation or proof that plaintiff ever demanded possession of the property; but the allegation and proof is that plaintiff demanded delivery thereof, while the undisputed evidence shows that neither plaintiff nor defendants were permitted by law to remove the property from its location on defendants' real property until a consent had been first obtained from the division of oil and gas. Such consent was never obtained by either plaintiff or defendants, hence neither could lawfully remove the property. It seems to be plaintiff's theory in this action, and upon which the court's conclusions and judgment appear to be founded, that it became defendants' duty, as owners of the land on which the oil well was located, to comply with such conditions so as to secure consent to a removal of the personal property—equipment—and thereupon deliver the same to plaintiff.

Section 16 of Act 4916 (Deering's Gen. Laws, 1931, p. 2412) requires the owner or

operator of any oil well, before abandoning the same, to do certain things in accordance with the methods approved by the state oil and gas supervisor. Section 16a provides that "no person * * * whether as principal, agent, servant, employee or otherwise, shall remove any rig, derrick or other operating structure, or the casing or any portion thereof, from any well referred to in this act, without first giving written notice to the supervisor. * * * The supervisor * * * shall, before the proposed date of removal, furnish the person * * * with a written report of approval of his proposal, or a written report stating what work must be done before approval to remove will be given." Violation of any provision of this act is declared a misdemeanor.

[1-3] Here we find the reason for the impasse which prevented plaintiff from recovering possession of its personal property. It consisted in the provisions of the law and the order of the oil and gas supervisor, coupled with the necessity to expend money to comply with such order. There is no evidence in the record which even intimates that defendants had any objection to plaintiff's removal of the property in question, or that defendants ever refused plaintiff the privilege of entering the real property to do the things required and remove its property. On the contrary, plaintiff had removed a portion when stopped by the oil and gas supervisor. Replevin is based on the supposition that plaintiff has a general or special property in the goods in dispute and a right to their immediate possession, and that defendant stands in the way of the exercise of this right. *Garcia v. Gunn*, 119 Cal. 315, 51 P. 684. There is no evidence herein tending to show that defendants stood in the way of plaintiff in any effort to retake or remove the property, but, on the contrary, it is manifest that the cause of plaintiff's failure to secure possession was the refusal of the supervisor of oil and gas to permit such removal until the conditions he imposed had been complied with. There was no duty on the defendants, as owners of the realty, to comply with said order and to remove and make actual delivery to plaintiff of the personal property in question. *Fifield v. Maine Central R. R. Co.*, 62 Me. 77; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195. On the other hand, we find in the conditional agreement of sale between plaintiff and Bogumill a clause (No. 10) which provides that in event plaintiff elected to retake possession of the property described therein, then the buyer, Bogumill, agrees to pay the seller any expenses incurred by the seller in

recovering the possession of said property. In the absence of any proof that defendants ever objected or refused to let plaintiff retake the property, or to enter the real property for the purpose of complying with the conditions imposed by the supervisor of oil and gas, the findings above referred to must fall for lack of support, and with them the judgment must go likewise.

As another trial would not be productive of any other or different evidence, and to the end that this case may be disposed of on one appeal, it is ordered that the judgment be and the same is reversed, and the cause remanded with directions to enter judgment in favor of defendants.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 581

WALTERS v. WEST AMERICAN INS. CO.
et al.*

Civ. 9253.

District Court of Appeal, Second District,
Division 2, California.

Feb. 14, 1935.

Rehearing Denied March 15, 1935.

Hearing Denied by Supreme Court
April 15, 1935.

1. Insurance ☞665(2)

Facts shown, in action against insurance company on judgment against insured for injuries caused by latter's automobile, held not to support trial court's finding that defendant entered into oral contract insuring judgment debtor against liability for injury to third person and giving latter right to sue company on judgment against insured (St. 1919, p. 776; Civ. Code, § 2586).

2. Insurance ☞141(1)

Benefit of estoppel of insurance company to deny oral automobile liability insurance contract, made by its agent, would not extend to person suing insurer on judgment against insured for injuries caused by automobile.

3. Insurance ☞141(1)

Provisions, which are not for benefit of either party to written insurance policy in which contained, but solely matter of statutory requirement, cannot be held to be included in oral insurance contract founded on equitable doctrine of estoppel (St. 1919, p. 776; Civ. Code, § 2586).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Jennie Cooper Walters against the West American Insurance Company and others. Judgment for plaintiff, and named defendant appeals.

Reversed, with directions.

Chapman & Chapman, of Los Angeles, for appellant.

Holland & Holland and Kenneth D. Holland, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment against one Lerner for injuries caused by the latter's automobile, and thereafter brought this suit against defendant insurance company alleging it to be liability insurance carrier of Lerner. Judgment was awarded to plaintiff, from which this appeal is taken.

[1] The trial court found that appellant had entered into an oral contract of insurance with Lerner insuring him against liability for injury or death of another by reason of the operation of his automobile, and that said oral contract included the right of an injured third person to sue the company on a judgment recovered against the insured.

The transaction involved, in addition to appellant, two individuals, Laswell and Graves, and a corporation, Commercial Discount Company. The discount company was in the business of buying automobile sales contracts at discount. It owned a majority of appellant's stock, occupied same quarters with it, and one man was vice president of both concerns, exercising general supervision of operations of both. Discount company was authorized to write policies of insurance in and for appellant insurance company providing coverage usually demanded by vendors in cases of such automobile contracts, not including public liability. It is conceded that Graves was a soliciting agent of appellant, having a license as such agent issued by the state insurance commissioner, was a customer of the discount company, and had never written any policy of insurance, but had received and transmitted applications and premiums. Laswell conducted an automobile loan business for himself in the same office with Graves, and handled his insurance under Graves' license. It was admitted that Graves and Laswell were not general agents with authority to write out policies in their own office.

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 43 P.(2d) 306.

Lerner, owner of the automobile which injured plaintiff, secured a loan on his car from Laswell, transferred the pink certificate of ownership to the latter, and signed a conditional sales contract, credit statement, and application for insurance. A memorandum was also signed noting his request for public liability insurance. Lerner paid for such liability coverage a premium of \$24. It was understood that the liability insurance had nothing to do with the loan or the vendor's insurance, although the premium was to be paid out of the proceeds of the loan. The documents were transmitted to the discount company, where the loan was discounted and the policies, except for public liability, were issued but were kept in files of the discount company; except that no application for liability insurance or premium therefor was ever sent to appellant or to the discount company and said policy was never issued, although the premium was not returned to applicant and he was not told that his application had been rejected. Lerner was told by Laswell that he would procure such insurance for him in a strong insurance company, but no specific company was named. There is nothing to indicate that he understood such policy would be in effect until it had been thus procured, that is, until there had been an acceptance by the company.

Lerner came to Laswell as a stranger. He had never heard of any of the parties, nor does it appear that he knew, at the time he transacted his business with Laswell, that the latter or Graves had anything to do with appellant insurance company as agents or otherwise. From the papers he signed he could see that the discount company would have some connection with the deal. Lerner never contacted the insurance company or discount company until after the accident, although when he had repaid his loan he received from the office of appellant his "automobile certificate policy," which clearly did not include any liability insurance.

On such state of facts we are unable to discover support for the trial court's finding that there was an oral contract. The instant case is readily distinguishable from *Marderosian v. National Casualty Co.*, 96 Cal. App. 295, 273 P. 1093, and *Eames v. Home Insurance Co.*, 94 U. S. 621, 24 L. Ed. 298, cited by respondent. The theory upon which respondent defends her recovery is that the parties entered into an oral contract and included in it by inference all the terms which would be included in the written contract, and that since the written contract if issued would

have included provisions as required by Act 3738, Deering's General Laws 1931, p. 1896, Statutes 1919, p. 776, entitling an injured third party to sue on an uncollectible judgment against assured, such provision would by implication be included in the oral contract and would justify the judgment in this case. It is conceded that the act cited applies by its terms to policies or written contracts as defined in Civil Code, § 2586. Respondent asserts, however, that "every clause in the written policy contemplated by the parties is part and parcel of the oral contract even though they are not known in detail by the agent and the insured at the time."

From an examination of many cases cited it is apparent that the oral contract which supports the judgment is frequently not an express contract, but a contract by estoppel. This view is expressed in *Massachusetts Bonding, etc., Co. v. Vance*, 74 Okl. 261, 180 P. 693, 701, 15 A. L. R. 981, cited by respondent. In supporting the claim of assured—not of a third party, as in this case—the court there said in conclusion: "For the purpose of defeating liability a party will not be heard to say he never made a contract, and, inconsistent with such assertion, retain the benefits flowing from the alleged transaction. In view of these facts, we must hold that the company is without power to assert that its agent had no authority to make the contract which it is alleged he did, or to say no contract was made, and at the same time keep and retain all the benefits flowing from such alleged contract. By keeping and retaining the premium paid, the company is denied the right to say that Evans had no authority to make the alleged contract, or to deny that there was a parol contract of insurance." Further language used in the same case would seem to be contrary to respondent's view herein as above indicated, to the effect that provisions which the statute requires to be inserted in a written contract of insurance are presumed to be included in such oral agreement. In this connection it quotes with approval from *Baile v. St. Joseph, etc., Ins. Co.*, 73 Mo. 371, as follows: "The distinction between a contract to insure or to issue a policy of insurance and the policy itself is obvious, and constantly recognized by the courts." The latter case, referring to a certain statutory provision, says that it "uses no prohibitory words; relates not to agreements to insure, but only to policies when completed and ready for official signature." It would seem that a statutory provision requiring insertion in a written policy of language as re-

quired by Act 3738, *supra*, relates not to a situation such as here presented but to one in which a written policy is issued.

[2,3] We have considered whether appellant would be liable if the facts warranted a finding of contract by estoppel, and have concluded that the benefit of any such estoppel would not extend to respondent, who was an entire stranger to the dealings between Lerner and Laswell. 10 Cal. Jur. 610. Our attention has not been directed to any case in which provisions which are not for the benefit of either of the contracting parties, but which are solely a matter of statutory requirement in written insurance policies, are held to be included in an oral contract founded not upon the express agreement of the parties but upon the equitable doctrine of estoppel. We have discovered no case or principle of law which would support such a contention. Under the evidence respondent may not recover from appellant.

Judgment reversed, with directions to the trial court to enter judgment for appellant.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 651

FRUIT GROWERS' SUPPLY CO. v. GOSS
et al.
Civ. 9481.

District Court of Appeal, First District,
Division 2, California.
Feb. 19, 1935.

Hearing Denied by Supreme Court
April 18, 1935.

1. Contracts ⇨282

Corporation contracting for remodeling to its satisfaction of lumber kiln, which was so clearly inadequate that corporation's dissatisfaction therewith was unquestionably reasonable, was entitled to reject work done thereon.

2. Principal and surety ⇨82(2)

Contractor's failure to remodel lumber kiln to satisfaction of corporation and reimburse latter for cost to it of labor and materials furnished contractor, as required by contract, rendered surety liable on contractor's bond to indemnify corporation against loss caused by contractor's failure to perform contract, without reference to guaranties of efficiency therein.

3. Principal and surety ⇨129(1)

Surety on bond of one contracting to remodel lumber kiln for corporation sending notice of contractor's default to surety's state office, instead of its office in another state as provided by bond, waived latter condition by taking care of entire matter at state office.

4. Principal and surety ⇨128(2)

Extension of time, granted contractor by owner, for satisfactory completion of work after contractor's default, being for benefit of surety on contractor's bond, surety's consent thereto may be implied.

5. Principal and surety ⇨125

Owner's failure to bring suit against surety on contractor's bond within six months after completion of contract, as required by bond if work was completed on date alleged, *held* no defense, where contract was never completed, in view of provision in bond for suit in any event within 12 months after date fixed in contract for completion thereof.

6. Principal and surety ⇨108(2)

Surety on bond for performance of contract to remodel lumber kiln, not completed by contractor, *held* not exonerated by changes, made by contractor in effort to make kiln satisfactory to owner, as required by contract, after extension of time for completion thereof; such changes not being consideration for extension.

7. Principal and surety ⇨101(2)

Changes, made in contract to remodel lumber kiln by owner and contractor to make it read as in original draft, on which contractor's bond was issued, after surety made changes unsatisfactory to contracting parties, *held* not to exonerate surety.

8. Principal and surety ⇨82(2)

Corporation *held* entitled to collect cost to it of labor and materials, furnished to one contracting to remodel lumber kiln for it, from surety on contractor's indemnity bond, though other agencies were not paid to satisfy guaranties of efficiency in contract, where satisfactory performance was admittedly impossible.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by the Fruit Growers' Supply Company against O. P. M. Goss, doing business under the name of the Goss Engineering & Construction Company, and the Globe Indemnity Company. Judgment for plaintiff, and defendant indemnity company appeals.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

Frank W. Murphy, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued for the cost to it of labor and materials furnished defendant Goss in connection with a contract entered into between plaintiff and said defendant, the faithful performance of which was the condition of a bond executed by the defendant Globe Indemnity Company. Plaintiff had judgment for \$4,332.02, with interest and costs, and the surety company appeals.

On February 11, 1929, the first draft of the contract between plaintiff and defendant Goss was drawn up, providing for the remodeling by Goss of three lumber kilns with certain specifications and guaranties. On this same date Goss obtained the bond from the surety in the sum of \$5,000. The final draft of the contract was dated March 16, 1929.

Plaintiff claims and the lower court found that Goss failed in the following details, all of which were covered in the contract: (1) He did not furnish labor and materials; (2) he gave the job his personal supervision only to a limited extent; (3) he did not remodel one of said kilns within four months of the signing of the contract; (4) he did not remodel any kiln to the satisfaction of the supply company; (5) he did not remodel any kiln in accordance with the guaranties as to successful operation; and (6) he did not pay the company the cost to it of labor and materials, having not completed a kiln to its satisfaction.

As its first and main defense appellant quotes from the bond: "That the surety shall not be liable * * * for the non-performance of any guarantees of the efficiency * * * of any work done or materials furnished." It then contends that the breach of contract was not a failure in constructing the kiln according to the plans and specifications, but was the failure of the kiln, as so constructed, to meet the guaranties of efficiency. But it is admitted that the kiln was not satisfactory, whereas the contract provided: "Said second party hereby agrees to remodel one of said dry kilns within the period of four (4) months from and after the date of this contract, to the satisfaction of said first party and in accordance with the following guaranties. * * *" Also, that the contractor would reimburse the supply company for expense of labor and materials "in the event that said first kiln shall not, when remodeled

as aforesaid, operate to the satisfaction of said first party. * * *" Respondent argues that to hold that merely because of the presence of guaranties in the contract the surety company is not to be held for the unsatisfactory nature of the kiln is to make the bond void and meaningless. It is also brought out that beside the breach of contract in regard to guaranties and satisfaction, Goss failed in four other respects, one, two, three, and six above, all of which respondent claims are in breach of contract and covered by the bond.

[1, 2] The bond undertook to indemnify the supply company against loss directly caused "by the failure of the principal to faithfully perform said contract. * * *" The trial court found a failure to perform in six particulars. Appellant concedes that the kiln was not satisfactory to respondent and that the latter acted in good faith in rejecting it. On this issue the evidence of the inadequacy of the kiln was so clear that there can be no question but that respondent's dissatisfaction was reasonable and well founded. Under such circumstances respondent was entitled to reject the work done. *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700, 182 P. 428, 6 A. L. R. 1493; *Thos. Haverty Co. v. Jones*, 185 Cal. 285, 296, 197 P. 105. Appellant might concede as well that its principal failed to reimburse the supply company for its expense for labor and materials, as there is no evidence to the contrary. These failures render appellant liable on its bond without reference to the guaranties.

The second defense is based on the condition in the bond, which reads: "That the plans and specifications mentioned in said contract are not in any respect defective, and are and at all times will be kept adequate for the complete performance of such contract. * * *" The appellant's contention that the specifications were defective is answered by the respondent's statement that there was no defect in the equipment or mechanics of the kiln, but rather in Goss' theory, which is not listed among the "specifications." But there is no evidence and no finding that the plans or the specifications were defective or inadequate, hence the point is not material to any question raised here.

[3] The third defense concerns a condition in the bond that, in case of default, notice should be sent to the surety's office in Newark, N. J. The notice of default was sent to the San Francisco office. But the supply company had been conducting the business with the San Francisco office and the latter took care of the entire matter with no refer-

ence to the New Jersey office. If the condition was material to any right of the surety it was waived by its conduct.

[4] As a fourth defense appellant argues that notice was not given it within ten days of the default, as required by the bond. The first testing of the kiln was completed on June 8th and the first notice was sent August 19th. Thus, it contends, the default occurred in the middle of June and the supply company then gave Goss a two months' extension of time without appellant's consent. But respondent argues that the default was not made until August and that the surety knew of the extension of time. The extension was an act done for the benefit of the surety, and its consent may be implied.

[5] Appellant's fifth defense is that the suit was not brought within the time required by the bond, and the sixth that process was not served on it within the required time. This contention is based on that part of the bond which provides that no suit shall be brought against the surety company unless brought and process served within six months after completion of the contract. Appellant then argues that the contract was completed on June 2, 1929, while the suit was not started until December 3, 1929 (one day late), and summons not served until July 9, 1930. But, since the contract was never completed, the following condition controls: " * * * And in any event within 12 months from the date fixed in said contract for completion. * * * " The finding that the contract was not completed is a sufficient answer to the point.

[6] In its seventh defense appellant argues that, since the first kiln had been completed according to specifications on May 29th and the changes made after that were not required by the contract, Goss must have rendered consideration for the extension of time and that the surety was for this reason exonerated. But the trial court found there was no completion, and, as the only changes made were in an effort to make the kiln satisfactory, as provided for in the contract, they were not for a new consideration.

[7] The eighth defense claims that, since a couple of changes were made in the contract after the bond was written, the surety cannot be held. But the bond was issued on the original draft. The surety company, without the knowledge or consent of respondent, then retyped the contract and in so doing made two changes which were not satisfactory to the contracting parties. The only changes made by the supply company and Goss after

this time were to make the contract read in effect as it had read in the original draft. These changes were not material, as they were a difference in description rather than in kind, and they did not in any manner affect the surety.

[8] In its ninth defense appellant argues that since the bond was an indemnity bond, plaintiff could only collect if other agencies had been paid to satisfy the guaranties. But it was admitted that satisfactory performance was impossible and the amount sued for was the cost of labor and materials put out by the supply company.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



BEAUMOND et al. v. PRUDENTIAL INS.
CO. OF AMERICA. *

Civ. 8753.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1935.

Rehearing Granted March 25, 1935.

1. Insurance ⇐583(2)

Payment to any of class of persons designated in facility of payment clause of life policy showing themselves to be equitably entitled to receive money will discharge insurer from obligations of policy.

2. Insurance ⇐583(2)

In making payment under facility of payment clause in life policy, insurer is required to exercise not only good faith, but reasonably sound judgment.

3. Insurance ⇐583(2)

In determining who is person equitably entitled to receive payment under facility of payment clause in life policy, insurer must be governed by equitable principles approximating at least those recognized by courts.

4. Insurance ⇐583(2)

Where illiterate insured signed forms given to him by insurance agent on representations that insured could thereby effect change of beneficiary, insurer elected to accept new beneficiary as person to be equitably entitled to money payable on insured's death within facility of payment clause in industrial life policies.

5. Insurance ☞583(2)

Insurer was not justified under facility of payment clause in paying proceeds of industrial life policies to public administrator after receiving beneficiary's claim and with full knowledge of her rights, on theory that public administrator was entitled to money for payment of funeral expenses, where such expenses had not been paid when insurer made settlement and they amounted to only \$322.50, while amount payable under policies was \$2,000.25, and insurer could have paid beneficiary on condition that funeral expenses would be paid out of insurance money.

6. Insurance ☞583(2)

Rule allowing insurer to act under facility of payment clause in life policy should not be extended to deprive named beneficiary of right to enforce payment, where payment has not been made in good faith to some one else.

7. Insurance ☞583(2)

When proofs of death and beneficiary's claims were submitted, insurer was charged with definite knowledge of beneficiary's rights, and could not thereafter act with complete indifference thereto.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Adelaide Beaumont and another against the Prudential Insurance Company of America. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

Herbert F. Bridges, of Los Angeles, for appellants.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiffs appeal from a judgment of nonsuit in an action upon a policy of industrial life insurance.

Egnacio Glory, a Filipino, insured his life under two policies issued by the defendant company payable "to the executors or administrators of the Insured immediately upon receipt of due proof of the prior death of the Insured during the continuance of this Policy, unless payment be made under the provisions of the next succeeding paragraph." This later provision, which is known as the facility of payment clause, states: "It is understood and agreed that the said Company may make any payment or grant any non-

forfeiture provision provided for in this Policy to any relative by blood or connection by marriage of the Insured, or to any person appearing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the Insured, for his or her burial, or for any other purpose, and the production by the Company of a receipt signed by any or either of said persons or of other sufficient proof of such payment or grant of such provision to any or either of them shall be conclusive evidence that such payment or provision has been made or granted to the person or persons entitled thereto, and that all claims under this Policy have been fully satisfied."

Some time after the issuance of the policies Glory took plaintiff Miss Beaumont to the office of the company and told the agent that he wanted to make her the beneficiary of his life insurance. The agent thereupon gave him two blanks which he signed. Each of them was in identical form, except as to policy number, and read as follows:

"I, the undersigned, insured under Policy No. * * * in the above named Company, hereby request and authorize the said Company, in event of my death prior to the death of the person next hereinafter named, to pay the amount of benefit specified in said policy to Adelaide Beaumont, my (state relationship, if any) Friend and the receipt signed by said person, or other sufficient proof of such payment, shall operate in the same manner as the receipt or proof of payment described in said policy.

"It is mutually agreed and understood, however, that nothing herein is to vary in any manner any of the provisions, agreements or conditions contained in said policy and the application therefor, especially the provision in the policy that the Company may make any payment provided for in the policy to any relative by blood or connection by marriage of the Insured, or to any other person appearing to said Company to be equitably entitled to the same, anything herein to the contrary notwithstanding. (Signature) Egnacio Glory."

The insured later died as the result of an accident, and \$2,000.25 became due on the two policies. Miss Beaumont made claim for the proceeds which the company refused to recognize, paying the amount to the public administrator as the administrator of the estate of the insured. Thereupon plaintiff Beaumont brought this action joining her coplaintiff as an assignee of an interest in the sum.

The insurance company's defense is that under the facility of payment clause it may pay the money to any person who comes within its provisions, and that having done so its action is conclusive and bars an action by any other person.

[1-3] While insurance policies such as the ones under consideration have been the subject of much litigation elsewhere, the construction of the facility of payment clause has not yet been passed upon by the appellate courts of California. It has been generally held in other jurisdictions, as contended by the defendant, that payment by the insurance company to any of the class or classes of persons designated in the facility of payment clause of the policy showing themselves to be equitably entitled to receive the money will operate as a discharge of the defendant from the obligations of the policy. But in making any payment the courts require not only good faith on the part of the insurer, but the exercise of reasonably sound judgment. The great power given to it under the contract which it has prepared and sold to the public cannot be exercised capriciously nor with arbitrary disregard for rights which it knows exists. "In determining who is the person 'equitably entitled' to receive payment, the insurer must be governed in making its choice by equitable principles approximating at least those recognized by the courts." *Zornow v. Prudential Ins. Co.*, 210 App. Div. 339, 206 N. Y. S. 92, 94; *Sylvester v. Metropolitan Life Ins. Co.*, 255 Mich. 302, 238 N. W. 234.

Tested by these principles, how has the defendant insurance company treated the rights of the plaintiff Beaumont? She accompanied the insured to the office of the defendant at the time he desired to make her a beneficiary under his policies. According to her testimony: "We went in the office and Mr. Glory called for Mr. Rogan to pay his dues on his policy and Mr. Rogan came out and Mr. Glory said to him 'Mr. Rogan, I wish to change the beneficiary on my insurance' and Mr. Rogan said, 'Oh, that can be fixed up, Egnacio' and he went into his office and returned with some slips for him. * * * Mr. Rogan asked him 'Who do you want for beneficiary,' and he said 'I want this young lady here, Miss Beaumont, to be my beneficiary,' he said she is the only friend I have and I want her to be my beneficiary in case something should happen to me. * * * And Mr. Rogan then put that slip of paper on the table and he said all you need to do is, Egnacio, is just sign here and that will change your beneficiary to this

young lady and Mr. Glory signed the slip of paper and he said to Egnacio if you want to be sure that this girl gets the money if anything should happen to you you should take out an insurance for her life, payable to your order then if anything should happen to either one of you the remaining one will be sure to get some money and—because you are her beneficiary and she is yours, see Egnacio you are her beneficiary and she is yours, so he said, all right, I will take out a policy on her life. * * * He got up and got a slip of paper for me to sign and I signed the slip of paper and Mr. Rogan says to me, now, that is all there is to it. And Mr. Glory paid my policy and paid for his own policy at the time, in fact he paid them ahead of time and they told me they would send my policy to me and Mr. Rogan gave me definitely to understand that all he had to do was to sign that paper and make me beneficiary."

[4] No other conclusion can be reached than that Glory, described in the testimony as a very illiterate Filipino boy who could read and write only a very little, signed the forms given to him by the insurance company's agent upon his representations that by such action Miss Beaumont became the beneficiary under the policies of insurance. Such conduct upon the part of the company amounted to an election on its part to accept her as the person to be "equitably entitled" to the money payable upon his death. This does not amount to any change in the terms of the policy. It is, as one court has said, "an agreement in addition thereto, and entirely consistent therewith, which may rest in parol and be enforced according to its terms." *Shea v. United States Industrial Ins. Co.*, 23 App. Div. 53, 48 N. Y. S. 548, 550.

[5] Also, the company paid the proceeds of the policies to the public administrator after receiving from Miss Beaumont her claim thereto, and with full knowledge of her rights. It seeks to justify this action by asserting that the public administrator was entitled to the money for the payment of funeral expenses. But these expenses had not been paid at the time the insurance company made its settlement and they amounted to only \$322.50, while the amount payable under the policies was \$2,000.25. The insurer could have paid Miss Beaumont on the condition that the funeral expenses would be paid out of the insurance money. Instead, it denied the claim of the one whom it knew that its insured desired to have the money, after he had done everything which the company told him was necessary to effectuate that purpose, in fa-

vor of the public administrator. Its action in so doing cannot be justified upon any principle of good faith or fair dealing.

[6,7] The rule allowing the insurer to act under the facility of payment clause should not be extended to deprive a named beneficiary of the right to enforce payment under such a policy, where payment has not been made in good faith to some one else. *Dorsey v. Metropolitan Life Ins. Co.* (La. App.) 145 So. 304. When the proofs of death and the claims of Miss Beaumont were submitted to the insurance company, it was charged with definite knowledge of her rights. It could not thereafter act carelessly or with complete indifference to them. *Sylvester v. Metropolitan Life Ins. Co.*, supra.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.



4 Cal.App.2d 483

In re LARZELERE'S ESTATE.

Civ. 9733.

District Court of Appeal, First District,
Division 2, California.

Feb. 11, 1935.

1. Executors and administrators ⇨93(1)

Order allowing executrix to continue testator's business and allowing her \$150 per month as for bookkeeping *held* void, where statute authorizing such expenditures was not effective until after issuance of order (Probate Code, § 902).

2. Executors and administrators ⇨93(1)

Executrix' claim of \$150 per month for services as bookkeeper in management of testator's business *held* properly disallowed, where, during period executrix conducted business, allowance amounted to \$1,175, and profits were only \$57, executrix did not, in fact, act as bookkeeper, and there were substantial claims against estate on which nothing had been paid (Code Civ. Proc. §§ 1616, 1618).

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of L. R. Larzelere, sometimes known and called Leigh R. Larzelere, deceased. From an order settling the first account of the executrix, Dorothy A. Larzelere, she appeals.

Affirmed.

James P. Sweeney, of San Francisco, for appellant.

Thomas W. Firby, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal from an order settling the first account of the executrix of the estate of the decedent.

Leigh R. Larzelere was formerly engaged as a commission merchant under the name of L. R. Larzelere & Co., and as such he was engaged in dealing in perishable vegetables. After his death his widow, Dorothy A. Larzelere, was appointed executrix of his last will and testament. She duly qualified, and thereafter she filed in the probate court a document purporting to be her first account. To the allowance thereof Thomas W. Firby, as assignee of one of the creditors, filed written objections. The settlement of the account and objections were referred to D. M. Coghlan as referee. He filed a report from which it appeared that there was a balance of \$2,088.60 chargeable to the executrix. Later, the settlement of the account came on for hearing before the court. The record discloses that oral evidence was introduced. Thereafter, the trial court made an order disallowing certain items of the total sum of \$1,650, and, making certain other changes, settled the account showing a balance due the estate from the executrix of \$2,081.60. From said order the executrix has appealed.

[1,2] At this time she contends that she should have been allowed the entire sum of \$1,650. That contention brings up additional facts. After being appointed executrix, in so far as the record discloses, the appellant made an ex parte motion that she be authorized to continue the business theretofore conducted by L. R. Larzelere & Co., and that she be allowed \$150 per month for conducting said business. On June 28, 1929, an order was made granting said application. Thereafter when she filed her first account she credited herself with \$150 per month as for bookkeeping. Such charges constituted the said sum of \$1,650 so disallowed as stated above. In their briefs counsel go outside of the record

TOWNE v. CITY OF LOS ANGELES et al.
(UNION BANK & TRUST CO. OF LOS
ANGELES, Intervener).

Civ. 8708.

District Court of Appeal, Second District,
Division 1, California.

Feb. 7, 1935.

Hearing Denied by Supreme Court
April 8, 1935.

1. Deeds ⇨121

Recital in quitclaim deed that conveyance was made subject to condemnation proceedings *held* not reservation of rights to grantors, but merely to express understanding of parties as to condition of title conveyed, and hence entire title and right to possession passed to grantee.

2. Eminent domain ⇨153

Where deed to property purchased subject to pending condemnation proceedings does not mention award money, award belongs to purchaser.

3. Eminent domain ⇨153

Grantee under conveyance made subject to condemnation proceedings became entitled to award money when interlocutory judgment awarding money became final, at which time grantee was owner, since award is payable to the one owning property at time it is taken, and title passed to public when interlocutory judgment was entered and money was paid into court (Code Civ. Proc. § 1253).

4. Eminent domain ⇨152(1)

Where assignors had parted with all rights to condemnation award under conveyance made prior to time interlocutory judgment making award became final, assignees of award money under assignment made subsequent to conveyance acquired no right to award, since assignees by their assignment could take no greater right than was possessed by assignors (Code Civ. Proc. § 1253).

5. Eminent domain ⇨152(1)

That condemnation award was made in names of former owners who prior thereto had parted with all rights to award through conveyance *held* not to create any rights to award in assignees under assignment of award from former owners made subsequent to conveyance, since after conveyance former owners were mere nominal parties to condemnation proceedings; grantee being real party in interest (Code Civ. Proc. §§ 385, 1253).

6. Eminent domain ⇨158

In controversy over rights to condemnation award, finding that former owners had not transferred their interest in award *held* not to offset admitted fact that land was con-

and state certain facts. Confining our consideration to the record, it may be stated that on the hearing of the first account it transpired there were claims owing by the estate some of which had been allowed and some of which had not been allowed. It also appeared that such claims were in substantial sums, and nothing had been paid thereon. There was also evidence that the executrix did not in truth and in fact act as bookkeeper, and that she was wholly incapable of doing so. The evidence disclosed that during the period she conducted the business the receipts thereof were \$64,068.32; that of said sum the executrix advanced \$1,175; that her disbursements were \$62,837.22, leaving a balance of \$57.10 as profit. In support of her claim that she should have been allowed the sum of \$1,650 she particularly relies on the purported order dated June 28, 1929. Thereupon she cites section 902 of the Probate Code. That section is the revised form of section 1581 of the Code of Civil Procedure, as amended by the Statutes of 1929, p. 157. But said statutes did not take effect until August 14, 1929. When the order relied on was made it was beyond the power of the court and was void. In re Estate of Ward, 127 Cal. App. 347, 15 P.(2d) 901. However, it will be conceded that under some circumstances the executor or administrator may continue the business of the decedent and that certain allowances will be made to him. Riedy v. Bidwell, 70 Cal. App. 552, 233 P. 995, and cases cited; 11b Cal. Jur. 270. This rule is so because of the provisions of sections 1616 and 1618 of the Code of Civil Procedure. Among other things, the section last quoted contained this provision: "In all cases, such further allowance may be made as the court may deem just and reasonable for any extraordinary service, but the total amount of such extra allowance must not exceed one half the amount of commissions allowed by this section." In applying that rule it has frequently been held that the allowance or disallowance is within the discretion of the trial court, and that it will be allowed when the trial court deems it "just and reasonable." While the record does not expressly recite the fact, in support of the judgment it must be presumed that in the opinion of the trial court, under all of the circumstances of this case, it was not just and reasonable to make the allowance in favor of the appellant.

We find no error in the record. The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

veyed without express reservation of any interest in condemnation award and consequent conclusion that interest in award had also been conveyed (Code Civ. Proc. §§ 385, 1253).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Harry Towne against the City of Los Angeles, Jose Cherques, William Levitt, and others, in which the Union Bank & Trust Company of Los Angeles intervened. Judgment for Jose Cherques and William Levitt, and plaintiff and intervener appeal.

Reversed.

Edward Linder, of Los Angeles, for appellant Towne.

Loeb, Walker & Loeb, of Los Angeles, for appellant Union Bank & Trust Co.

N. B. Nelson, of Los Angeles, for respondents Kamischer, Cherques, and Levitt.

SHINN, Justice pro tem.

On September 19, 1928, defendant J. Kamischer and Mary Kamischer, being the owners in fee of certain real property, conveyed the same by quitclaim deed to the plaintiff Harry Towne. There was pending at that time an action brought by the city of Los Angeles to condemn portions of the property. The deed to plaintiff recited that it was made "subject to encumbrances, liens, taxes, assessments, condemnation proceedings, and rights of way of record." Since receiving his deed plaintiff has continued to be and is now the owner of the property. On November 21, 1928, he executed a deed of trust of the property to secure an indebtedness to Union Bank & Trust Company of Los Angeles, intervener herein. On January 6, 1930, an interlocutory judgment was entered in the condemnation proceeding and the judgment becoming final, and the parties hereto having asserted their conflicting claims thereto, the award was paid into court to abide the result of the present action. On August 4, 1930, Kamischer and wife purported to assign to defendants Jose Cherques and William Levitt the award made in the condemnation proceeding in the amount of \$8,633. The latter claim the award under this assignment; plaintiff claims it under the deed of the property to him; and Union Bank & Trust Company asserts a right to the fund under the deed of trust from Towne. Judgment went in favor of defendants Cherques and Levitt in the lower court, from which plaintiff and intervener appeal. The sole question is whether the right to receive the award was reserved to the grantors at the

time of the conveyance of the property to Towne, or passed to the grantee.

[1] It is admitted that the deed to plaintiff was duly executed, delivered, and recorded on September 19, 1928. The recital that the conveyance was made "subject to condemnation proceedings" did not amount to a reservation of any rights to the grantors. It merely expressed the understanding of the parties as to the condition of the title conveyed. *Russakov v. McCarthy Co.*, 206 Cal. 682, 275 P. 808, and cases cited. The entire title and right to possession of the grantors therefore passed to the grantee. *Rego v. Van Pelt*, 65 Cal. 254, 3 P. 867; *Taylor v. Opperman*, 79 Cal. 468, 21 P. 869.

[2] In *Security Co. v. Rice*, 215 Cal. 263, 9 P.(2d) 817, 818, 82 A. L. R. 1059, it is said: "The universal rule appears to be that, where property is purchased which is subject to pending condemnation proceedings and the deed conveying said property is silent as to the award money to be paid in the proceedings, said money belongs to and is payable to the purchaser." (Citing cases.)

[3] Under this rule the award is payable to the one who owns the property at the time it is taken in the condemnation proceedings. Plaintiff became entitled to the award when the interlocutory judgment became final. Title passed to the public when the interlocutory judgment was entered and the money was paid into court. Code Civ. Proc. § 1253; *McDaniels v. Dickey*, 219 Cal. 89, 25 P.(2d) 404.

[4] Respondents by their assignment could take no greater right to the award than was possessed by their assignors. Kamischer and wife had parted with all their rights long prior to the entry of the interlocutory judgment, and the purported assignment therefore conveyed nothing to respondents.

[5] The award was made in the names of the Kamischers. This fact, however, is not important. After their conveyance of the property they remained mere nominal parties, plaintiff being the real party in interest. Code Civ. Proc. § 385; *Tuffree v. Stearns Ranchos Co.*, 124 Cal. 306, 57 P. 69; *Malone v. Big Flat, etc., Co.*, 93 Cal. 384, 28 P. 1063.

[6] Respondents rely upon the finding of the trial court that Kamischer and wife did not transfer their interest in the condemnation award to Towne, as alleged in the complaint. This allegation was immaterial; it was alleged and admitted that the land was conveyed, and a separate assignment was unnecessary. The finding that there was no

transfer must give way to the admitted fact that the land was conveyed without express reservation. There was neither allegation in the answer nor finding to the effect that any rights were reserved to Kamischer and wife at the time of their conveyance to plaintiff.

Plaintiff is entitled to receive the amount of the award heretofore deposited in court, subject to such rights as may be established by the intervener Union Trust & Savings Bank of Los Angeles.

For the foregoing reasons, the judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.



4 Cal.App.2d 670

**BOCHNER v. EQUITABLE LIFE ASSUR.
SOC. OF THE UNITED STATES.**
Civ. 9305.

District Court of Appeal, Second District,
Division 2, California.

Feb. 20, 1935.

Hearing Denied by Supreme Court
April 18, 1935.

1. Appeal and error ⇨1011(1)

Finding that insured was not wholly disabled under terms of health policy *held* conclusive on appeal, where record disclosed expert evidence conflicted on question of disability.

2. Appeal and error ⇨1048(3)

In action on health policy, question asked physician whether his opinion as to insured's ability to work was based on his observation and treatment of others afflicted similarly to insured *held* not prejudicial, where whole testimony disclosed that physician's opinion was based on his experience with insured and others.

3. Appeal and error ⇨1048(5)

In action on health policy, question asked physician whether his other patients afflicted similarly to insured did any work *held* not prejudicial, where physician, after answering, explained general conditions under which such patients worked.

Appeal from Superior Court, Los Angeles County; Leo Aggeler, Judge.

Action by Jacob J. Bochner against the Equitable Life Assurance Society of the United

States, wherein defendant filed a counterclaim. From judgment in favor of defendant, plaintiff appeals.

Affirmed.

Albert Sidney Brown, of Los Angeles, for appellant.

Newlin & Ashburn and Ray J. Coleman, all of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Appellant, plaintiff below, brought suit against respondent to recover weekly indemnities under a health policy of insurance. Respondent denied liability, and by counterclaim sought to recover certain payments of such indemnities theretofore made. After trial by the court, findings and conclusions were filed and thereon a judgment was entered that plaintiff take nothing and that defendant recover from plaintiff the sum of \$428.56, with certain interest. From this judgment this appeal is prosecuted, and the chief contention of appellant is that the findings in respect to the question of disability and on the issues raised by the counterclaim are not supported by the evidence.

The indemnity clause provided that if disease shall wholly and continuously disable the insured and prevent him from performing any and every duty pertaining to *his* occupation, the society will pay for the period of such continuous disability the sum of \$50 per week for not exceeding 52 weeks; and that after such payment for 52 weeks the society will continue the payment of weekly indemnities in the same amount thereafter so long as the insured shall be wholly and continuously disabled by such disease from engaging in *any* occupation or employment for wage or profit. It was alleged in the complaint and found by the court that from July 12, 1929, to August 22, 1931, respondent paid the weekly indemnities to appellant as for total disability in respect to his occupation. The court further found that from August 23, 1931, to date of trial appellant was not wholly and continuously disabled by disease from engaging in *any* occupation or employment for wage or profit, and that, by reason of false representations made by appellant, respondent had paid indemnities amounting to the sum of \$428.56 over the period from August 23, 1931, to October 21, 1931.

[1] It is obvious from a reading of the briefs, and quite manifest after inspecting the transcript of the evidence, that there was a real and substantial conflict in the evidence considered by the court in making its find-

ings. The question of disability was one of fact for the court to decide upon all the evidence. *Sherman v. Continental Casualty Co.*, 103 Cal. App. 518, 284 P. 946. The opinions of the physicians who testified are on opposite sides of the question of disability. This expert opinion evidence alone, in view of the nature of appellant's affliction, is sufficient to create a substantial conflict, and the finding of the trial court thereon is conclusive. *Fitzgerald v. Globe Indemnity Co.*, 84 Cal. App. 689, 258 P. 458.

[2, 3] Appellant assigns as error the overruling of objections to two questions propounded to a physician by respondent's attorney. The first question objected to was as to whether or not the doctor based his opinion as to ability of appellant to engage in an occupation from his observation and treatment of others suffering in like manner as appellant. His whole testimony shows fully that the doctor based his opinion upon his experience with appellant and others, and the ruling was therefore not prejudicial. The other question objected to was propounded to the same witness, and merely inquired as to whether or not the doctor's other patients, suffering in like manner as appellant, did any work. The witness, after answering the question, thoroughly explained the general conditions under which such patients may and do work. No prejudice could have resulted from the affirmative answer to the question.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 604

DE GARMO v. LUTHER T. MAYO, Inc.,
et al.
Civ. 9276.

District Court of Appeal, Second District,
Division 2, California.

Feb. 16, 1935.

Rehearing Denied March 15, 1935.

Hearing Denied by Supreme Court
April 15, 1935.

I. Limitation of actions §55(3)

Cause of action against attorney for negligence in prosecution of lawsuit *held* barred by lapse of two years after entry of judgment in suit, since negligence, if any, occurred prior to entry of judgment, and acts sub-

sequent thereto related to damages rather than liability (Code Civ. Proc. § 339).

2. New trial §143(2)

Affidavits of jurors as to alleged misconduct of bailiff in commenting to them about case after their retirement *held* properly rejected upon motion for new trial, since jurors cannot impeach verdict by any means, except in case of chance verdicts (Code Civ. Proc. § 657).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by G. C. De Garmo, substituted for J. B. Burns, against Luther T. Mayo, Incorporated, and Luther T. Mayo, in which defendants interposed a counterclaim. Judgment for plaintiff, and defendants appeal.

Affirmed.

Benjamin S. Crow, of Los Angeles, for appellants.

Newby & Newby, G. C. De Garmo, and W. M. Crane, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment for attorney's fees for services to defendants, from which the latter appeal.

[1] A counterclaim was interposed by defendants setting out that through negligence of plaintiff they had been damaged in the sum of \$5,000. Defendants had sued an investment corporation, and assert that the judgment recovered by them was less by that amount than the sum to which they were entitled. The trial court held that the cause of action on the counterclaim was barred by the limitation imposed by section 339 of the Code of Civil Procedure, and excluded it from consideration by the jury. Judgment in said suit by defendants against the investment corporation was entered March 7, 1930. Suit in the instant case was filed March 21, 1932. Contrary to the suggestion of appellants that this was error, it appears that the ruling of the trial court was correct. The negligence, if any, occurred prior to entry of the judgment; the acts subsequent thereto relate to damages rather than liability.

The Supreme Court of the United States considered this question over a century ago in *Wilcox v. Executors of Plummer*, 4 Pet. 172, 181, 7 L. Ed. 821, and said: "The ground of action here, is a contract to act diligently and skilfully; and both the contract and the breach of it admit of a definite assignment of

date. When might this action have been instituted, is the question; for from that time the statute [of limitations] must run.

"When the attorney was chargeable with negligence or unskilfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but on the other hand, it is perfectly clear, that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action."

"Under section 339 of the Code of Civil Procedure, a cause of action against an attorney for neglect of duty in the management of an action is barred at the expiration of two years after the neglect occurred. *Hays v. Ewing*, 70 Cal. 127, 11 P. 602." *Jensen v. Sprigg*, 84 Cal. App. 519, 522, 258 P. 683, 685. See, also, *Lattin v. Gillette*, 95 Cal. 317, 30 P. 545, 29 Am. St. Rep. 115, and *Medley v. Hill*, 104 Cal. App. 309, 285 P. 891. The conduct of plaintiff in connection with subsequent proceedings relating to motion for new trial and appeal does not affect the limitation imposed by the section cited. *Jones v. Gregory*, 125 Wash. 46, 215 P. 63.

[2] In support of their motion for new trial defendants offered affidavits of certain jurors as to alleged misconduct of the bailiff in making comments to them about the case after they retired to deliberate. Counter affidavits of two of the same jurors and three other jurors were presented by plaintiff. All of such affidavits were properly rejected by the trial court. "Upon well-grounded considerations of public policy jurors are legally disabled to impeach their verdict by any means, whether it be by affidavits or by testimony or by extrajudicial statements," except in the case of so-called "chance verdicts." *People v. Reid*, 195 Cal. 249, at page 261, 232 P. 457, 462, 36 A. L. R. 1435; *Code Civ. Proc. § 657*; *People v. Odza*, 134 Cal. App. 290, 25 P.(2d) 264; *Walter v. Ayzazian*, 134 Cal. App. 360, 25 P.(2d) 526.

Appellants claim that the bailiff's acts amounted to "irregularities in the proceedings" rather than misconduct of the jury. The officer was accused of attempting to hurry the jury into reaching a verdict and making comments designed to elicit sympathy, not for plaintiff but for defendants, who are appellants here. Even if the mild remarks charged to the officer were made by him, it would appear that any consequent

error would have to be attributed not to such irregularity but to the misconduct of stupid and supine jurors, who would violate their oaths and without being coerced or threatened would precipitately reach a wrong verdict by unanimous agreement following such suggestions. The affidavits confessing such misconduct would naturally be excluded under the rule above quoted.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 530

WHITAKER v. DEPARTMENT OF WATER
AND POWER OF LOS ANGELES

et al.

Civ. 10071.

District Court of Appeal, Second District,
Division 2, California.

Feb. 13, 1935.

Hearing Denied by Supreme Court
April 15, 1935.

1. Municipal corporations ⇨218(1)

Civil service commission rule providing for abolishment of seniority rights prior to employee's separation from service held valid and not to conflict with city charter section, providing merely for manner of suspension and restoration of employees and not speaking of those who were separated from service nor their reinstatement.

2. Municipal corporations ⇨218(1)

Municipal employee under civil service regulations, who voluntarily resigned to accept political appointment, held entitled to have seniority credits computed only from time he was reappointed to municipal position under civil service as against contention that under city charter employee lost none of his rights under civil service, though he separated therefrom by his resignation to accept a political job as distinguished from a civil service job.

Proceeding in mandamus by Otto C. Whitaker against the Department of Water and Power of the City of Los Angeles and others.

Writ denied.

Loren A. Butts, of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., of Los Angeles (S. B. Robinson, of Los Angeles, of counsel), for respondents.

CRAIL, Justice.

This is a proceeding in mandamus to compel the respondent board of water and power commissioners of the city of Los Angeles to restore petitioner to duty in the position of chief clerk in the department of water and power and to compel respondents to pay the petitioner the salary allegedly due him from September 6, 1933, until he is restored to duty. The petitioner had been a civil service employee of the respondents for many years, when on October 21, 1928, he was appointed and accepted the position of special commercial agent, a position not under civil service. In this position he continued until December 10, 1930, when he was again appointed to a position under the civil service, and he continued in that position until the position was abolished. The petitioner contends that he is entitled to credit on his seniority for the period during his separation and in any event for his years of service prior to the time he separated himself from the civil service. It is the contention of the respondents, however, that petitioner's separation from the civil service by reason of his resignation in 1928 has deprived him of the seniority which he claims, and it refuses to remove the incumbent whom petitioner seeks to displace.

Section 9 of rule XVIII of the rules of the civil service commissioners of Los Angeles provides that, if an employee has been separated from the service by resignation and is again employed, he shall not receive any seniority credit for his service rendered prior to his separation from the service. Petitioner frankly admits, "should this honorable court decide that section 9 of rule XVIII of the Civil Service Commission is valid and that when petitioner vacated the position of chief meter reader on December 1st, 1928, to accept the position of special commercial agent, he was thereby separated from the service by resignation, then no further question involved in this proceeding need be considered for the reason that in that event the petitioner would have only such seniority as he has accumulated subsequent to December 10, 1930."

[1] In determining whether or not said rule is valid, we should keep in mind that the civil service system has a terminology of its own, and that throughout its literature it makes a sharp distinction between absence from the

service and separation from the service. The charter provisions (and the petitioner relies upon a charter provision) make this distinction between absence from the service and separation from the service. "Absence" from the service connotes a temporary severance from service. "Separation" from service connotes a final or permanent severance. Neither the rules nor the practice under the civil service system have ever contemplated leaves of absence for those who resign or are separated from service. The section of the city charter which deals particularly with separation from service is section 110, whereas section 125, upon which the petitioner relies, deals with absence from service, but does not deal at all with separation from service. The part of section 125 upon which petitioner relies is as follows: " * * * And any person so suspended shall be entitled to displace the person holding a position in a class-group in which a regular position was formerly held by the person so suspended, who has a shorter length of service in such class-group and in classes of higher rank after deducting periods of absence from the city service since original regular appointment in such class as provided by the rules of the Board." This section provides for the manner and order in which persons may be suspended and restored, but it does not speak of persons who are separated from the service nor of their reinstatement. In the light of what we have said, it is apparent that section 9 of rule XVIII is not in conflict with section 125 of the city charter and is not invalid.

[2] The next question for us to determine is whether or not the petitioner resigned his position under the civil service when he voluntarily separated himself from it to accept a position with a much larger salary but which did not have the protection and benefits of the civil service provisions. That the petitioner did so resign is made clear by his own statement in his "Request for Restoration to Eligible List," dated November 20, 1930 (Respondents' Exhibit No. 7), in which he expressly stated that he "resigned to take exempt position in Department of Water and Power," which is confirmed by the "Termination of Employment," dated December 10, 1928 (Respondents' Exhibit No. 6), which bears the words, "Resigned—Appointed Special Commercial Agent." Having resigned his position under the civil service system and having voluntarily separated from and surrendered his previous seniority credits, petitioner's appointment in 1930 became an "original appointment." It is evident therefore

that the petitioner is not entitled to a writ of mandate.

Petitioner contends both in his brief and in his reply brief that there are two kinds of service, exempt and classified, and that the words "city service" in section 125 embrace both kinds, and therefore he loses none of his rights under civil service even though he is separated therefrom by his resignation to accept a political job as distinguished from a civil service job. The word "city" in this connection was used to limit the service which would count toward seniority to service for the city of Los Angeles as distinguished from a position in the competitive class of civil service of the state or any of its civil divisions. But the service must be "civil service." Petitioner relies upon *Schaefer v. Rathmann*, 237 App. Div. 491, 261 N. Y. S. 466, in which the court holds that under the laws of New York the word "service" may be considered "city service." But in the very next sentence of the opinion it is made clear that in order to come within the benefits of the civil service law, the service, whatever it may be, must be "within the civil service of the city."

The respondents present several other grounds to sustain their contention that petitioner is not entitled to a writ, but, those already treated being fundamental and decisive, we shall not prolong this opinion.

Writ of mandate denied.

I concur: STEPHENS, P. J.



4 Cal.App.2d 598

HERT et ux. v. FIRESTONE TIRE & RUBBER CO. OF CALIFORNIA et al.
Civ. 9268.

District Court of Appeal, Second District,
Division 2, California.
Feb. 15, 1935.

1. Automobiles ⇨168(2)

Violation of statute requiring prudent speed and due regard for conditions when driving automobile is negligence as a matter of law (St. 1931, p. 2120, § 113).

2. Automobiles ⇨201(10)

Collision between automobiles when defendant attempted to pass plaintiffs' auto-

mobile was not unavoidable so as to relieve defendant from liability if jury found that defendant motorist was guilty of negligence proximately contributing to collision.

3. Automobiles ⇨242(2)

Jury could not assume by mere happening of automobile collision that either plaintiff was negligent.

4. Damages ⇨26

Person damaged through another's negligence may recover such amount as will compensate him for all detriment proximately caused thereby, whether it could have been anticipated or not.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Casper Hert and wife against the Firestone Tire & Rubber Company of California and H. L. Hoffman. Judgment for plaintiffs, and defendant Hoffman appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiffs, husband and wife, recovered judgment for damages resulting from a collision between their sedan driven by the husband and another sedan operated by defendant Hoffman. The latter was following plaintiffs' car, somewhat to its left, and on undertaking to pass it to the left collided with it. Plaintiffs contended that defendant swung his car to the right in front of them, and defendant claimed plaintiffs caused the accident by swerving to the left. Appellant concedes that "the evidence was sufficient to support a verdict by the jury in favor of either party," but contends that certain of the court's instructions must have misled them.

[1-4] The jury were given the substance of section 130 of the California Vehicle Act (St. 1923, p. 558, as amended by St. 1925, p. 413), regarding the duty of a driver to exercise care when making a turn. The court also read section 113 of said act (St. 1923, p. 553, as amended by St. 1931, p. 2120), requiring prudent speed and due regard for conditions when driving, and told the jury that violation of that section was negligence as a matter of law. The instructions were further given that the accident was not unavoidable if they

found defendant was guilty of negligence proximately contributing to it, and that they could not assume by the mere happening of the accident that either plaintiff had been negligent. The following language was also used; "You are instructed that a person damaged through the negligence of another is entitled to recover such an amount of money or damages as will compensate for all the detriment proximately caused thereby whether it could have been anticipated or not."

We have read the court's entire charge. The instructions given correctly stated the law applicable to the case, and there is nothing to indicate that the jury could have been or were in fact misled or confused as to the legal principles involved, or that they misapplied them to the facts.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 611

JANES v. EDWARDS.

Civ. 8490.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1935.

Hearing Denied by Supreme Court
April 18, 1935.

1. Parent and child ↪4

Evidence which disclosed that mother, who was unable to work, owned property on which mortgage and taxes were unpaid, that some income was derived, but that gross income, if all property were rented, would barely support mother, *held* to sustain finding that mother was "poor person" under statute which made it duty of children to maintain such person (Civ. Code, § 206).

[Ed. Note.—For other definitions of "Poor Person," see Words & Phrases.]

2. Parent and child ↪4

Statute which makes it duty of children to maintain poor parent does not require that parent, to obtain support, must be absolutely destitute (Civ. Code, § 206).

Action by Nellie A. Janes against Walter E. Edwards. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Charles Schusterman and Harriet W. Pugh, both of Los Angeles, for appellant.

J. E. Manning, of Sanger, and Russell Graham, of Los Angeles, for respondent.

YORK, Justice.

This is an appeal from a judgment rendered against a son for the support and maintenance of his mother, the respondent herein.

Defendant's appeal is based principally upon two contentions: (1) That the evidence is insufficient to sustain the finding that the respondent is a poor person within the contemplation of section 206 of the Civil Code; and (2) that the evidence is insufficient to sustain the finding that the respondent is not able to maintain herself by work.

That portion of section 206, *supra*, affecting the cause of action here is as follows: " * * * It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability."

Some of the evidence as to the ability of the mother to support herself is uncertain, but there was introduced sufficient evidence to enable the trial court to make its finding that "the said plaintiff is a poor person and is unable to maintain herself by work."

[1, 2] It is true that the plaintiff had real estate, which was subject to a mortgage at the time of the hearing, and that three payments on the principal of this mortgage were past due; that the taxes were about due, and she testified that she had no money to pay them. It is also true that some income was derived from the property, but the gross income, if all of the property was rented, would have been barely enough to support her. It was also shown that she was unable to obtain work at the time of the hearing. Section 206, *supra*, does not require that a mother in order to obtain support must be absolutely destitute.

The findings are sufficient to sustain the judgment. The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

4 Cal.App.2d 621

SCOTT et al. v. ALLEN.
Civ. 9266.District Court of Appeal, Second District,
Division 2, California.

Feb. 18, 1935.

Rehearing Denied March 20, 1935.

Hearing Denied by Supreme Court
April 18, 1935.**1. Courts** ⇐121(4)

Superior court had jurisdiction of action, although judgment for \$6,000 directed payment of \$1,000 to one plaintiff and \$5,000 to other, as against contention that municipal court had exclusive jurisdiction of \$1,000 payment, where there was only one demand, for \$6,000, one complaint, one trial, one judgment, and one appeal, and no question was raised as to misjoinder of parties, causes of action, or lack of jurisdiction.

2. Judgment ⇐21

In action for return of price of units purchased in oil venture, judgment requiring payment to plaintiffs of definite sums, return of units to defendants, and providing defendants with adequate remedy for enforcement thereof, *held* not invalid for uncertainty.

3. Appeal and error ⇐931(1)

On appeal it is reviewing court's duty to view evidence in light most favorable to prevailing party.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Ralph J. Scott and another against Walter B. Allen. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for appellant.

Roland Rich Woolley, of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal from a judgment of the superior court in an action in which the plaintiffs sought a money judgment alleging fraud and rescission and for the return of the purchase price of certain units in an oil venture which they purchased from the defendant. The judgment was for \$6,000 and it directed that \$1,000 thereof be paid to plaintiff Scott and \$5,000 thereof to plaintiff Laws.

[1] Appellant's first contention is that the superior court did not have jurisdiction in so far as Scott's recovery is concerned for the reason that "the complaint constituted two separate and distinct causes of action, one for

the sum of \$1,000.00" over which the municipal court had exclusive jurisdiction. Appellant relies upon the recent case of Philpott v. Superior Court (Cal. Sup.) 36 P.(2d) 635. In that case the Supreme Court carefully and painstakingly reviewed the development of assumpsit from its inception to the present time and concludes that actions similar to the instant case are actions at law and not in equity, and that in such cases where the demand is not over \$2,000 the municipal court alone has jurisdiction. In the instant case, however the demand was for \$6,000. There was one complaint, one trial, one judgment, one appeal. In the trial court no question was raised as to misjoinder of parties or causes of action or as to lack of jurisdiction. We are bound to assume that the two causes of action were consolidated for all purposes, including the purpose of determining jurisdiction. Obviously the amount involved was more than \$2,000.

[2] It is next contended by appellant that the judgment should be reversed for uncertainty. There is no merit in this contention. The judgment is certain in that it provides that the defendant shall pay to the plaintiffs the sums of \$5,000 and \$1,000 respectively. It also provides for the turning over to the defendant by the plaintiffs of the things of value received by the plaintiffs, i. e., the units of stock and certain dividends thereon. The judgment is mandatory against the plaintiffs as well as against the defendant, and the defendant has a clear and adequate remedy to enforce compliance thereof. The judgment contains a definite statement of the rights of the parties and a definite means of ascertaining them, and we find no uncertainty which would entitle the defendant to a reversal. 14 Cal. Jur. 954 et seq. The defendant may deduct the amounts received by the plaintiffs as dividends from the amount which he pays to satisfy the judgment, and if there is some dispute, the matter can be determined on supplemental proceedings.

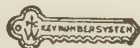
Appellant next contends that the plaintiffs waived their right to recover judgment. This was a question of fact (not a question of law) which was determined by the trial court adversely to the defendant upon substantial evidence, and is beyond our attention.

[3] Appellant's final contention is that the transaction involved was not between himself and the plaintiffs, but between his brother, C. G. Allen, and the plaintiffs, and therefore the defendant is not liable in this action. It is our duty on appeal to view the evidence in the light most favorable to the respondents,

and viewed in this light the entire transaction of the plaintiffs from its inception to its consummation was with the defendant and no other. For the reasons stated the judgment should be affirmed.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



LACY v. GREER-ROBBINS CO. *

Civ. 1138.

District Court of Appeal, Fourth District,
California.

Feb. 11, 1935.

Rehearing Denied March 12, 1935.

Hearing Granted by Supreme Court
April 11, 1935.

1. Sales ⇨397

In action for rescission of sale of automobile for breach of warranty, evidence supported findings that automobile was defective and unsuitable for purpose for which it was intended.

2. Sales ⇨273(1)

Under Civil Code article relating to warranties of sales, before amendment of 1931, sale of new automobile which was not manufactured by seller and which buyer purchased after looking at it on floor of salesroom, did not imply warranty that automobile would be suitable to serve ordinary purposes for which it was made and sold (Civ. Code, § 1764).

3. Sales ⇨273(1)

Warranty was not implied in sale of new automobile by dealer on ground that automobile was inaccessible to buyer's examination as to mechanical construction, where buyer had opportunity to examine automobile if he so desired (Civ. Code, §§ 1764, 1767, 1771).

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by P. W. Lacy against the Greer-Robbins Company. From a judgment for plaintiff, defendant appeals.

Reversed.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for appellant.

Bradner & Weil, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

On February 9, 1931, the plaintiff agreed to purchase from the defendant under a conditional sales contract a new Chrysler automobile for \$2,282.67, payable in installments. Within a day or two he discovered that the machine did not operate properly and took the same to the defendant's place of business to have the defects corrected. The defendant's employees were unable to discover what caused the trouble, and told him to drive the car "another thousand miles," and that the defects might disappear when the car was broken in. The defective condition of the car continued, and the plaintiff had it in the defendant's garage some twenty times, sometimes leaving it there several days at a time. The defendant's employees were never able to locate the cause of the trouble, and finally, in August, 1931, the plaintiff was told that nothing more would be done for him. Having by that time paid \$890 on account of the purchase price, he gave notice of rescission, tendered back the car, and demanded the return of the amount paid. The defendant refused to comply with the demand for rescission, but took possession of the car when the plaintiff refused to make the next payment. The plaintiff brought this action to recover the amount paid and recovered judgment for \$380, the court finding that the value of the use of the car in the meantime was \$510. From the judgment entered the defendant has taken this appeal.

[1] The court found that this automobile was defective and not suitable for the purpose for which it was intended. Although not without conflict, the evidence supports these findings. The main question here presented is whether the evidence supports certain other findings to the effect that the appellant had warranted to the respondent that the automobile would function properly, that it was sound, merchantable, and fit for the purposes for which it was intended, and that the appellant had no knowledge of any defects in the car. The court further found that the respondent relied upon each and all of these facts and that "each of said warranties was, and all of them were untrue."

The conditional sales contract was not introduced in evidence and is not before us. The respondent, conceding that there were no express warranties and that no statements

were made to him, relies entirely upon the contention that there was an implied warranty that this automobile would be suitable to serve the ordinary purposes for which it was made and sold. It was a new car which was not manufactured by the appellant, and the respondent purchased the same after looking at it on the floor of the salesroom.

[2] In *Silverthorne v. Simon*, 59 Cal. App. 494, 211 P. 26, 28, the court said: "The contract contains nothing in the nature of a warranty, and the mere conditional agreement to sell does not imply a warranty. Civ. Code, § 1764." In *Wardlow v. Sanderson*, 190 Cal. 417, 213 P. 35, 36, it is said: "There had been no breach of any warranty of sale on the part of the vendor. In the article of the Civil Code relating to warranties of sales, it is declared that 'Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty.' Civ. Code, § 1764. That article does not provide for any warranty applicable to the facts of this case."

The provisions of the Civil Code relating to such warranties were amended in 1931 (St. 1931, p. 2234), but we are here concerned with the law as it existed prior thereto. While certain other cases are relied upon by the respondent, these cases involved either express warranties or facts which brought them within the exceptions provided in this article of the Civil Code before these amendments became effective.

[3] It is argued that the facts of this case bring it within the exceptions formerly provided by sections 1767 and 1771 of the Civil Code. While the court found that at the time the respondent agreed to purchase this automobile he relied upon the advice and judgment of the appellant, that the appellant well knew this fact, that at that time the automobile was "inaccessible to the examination of the plaintiff as to its mechanical construction," that the respondent had no knowledge or means of knowledge of such matters, that the appellant had full knowledge of the actual condition of the automobile, and that the appellant failed to inform the respondent concerning said condition, the record is entirely devoid of evidence to sustain any of these findings. There is no evidence that the appellant made any statements or gave any advice to the respondent, and none that the appellant knew of the defects which later developed or had knowledge of any fact which would destroy or affect the buyer's inducement to buy. Nor do we think this automo-

bile was inaccessible to the examination of the buyer, within the meaning of section 1771 as it then read. The car was there, and was looked over to some extent by the buyer, and it has been frequently held that this section has no application where an opportunity to examine the merchandise exists, but where a complete examination is not made because the same would involve some expense and inconvenience. The respondent had an opportunity to examine the car if he so desired, and it fully appears that the appellant had no knowledge of the defects which later appeared.

There being no evidence in the record to bring this case within any of the exceptions then provided for in the article of the Civil Code referred to, it follows that a warranty cannot be implied, and that these essential findings are without support in the evidence.

The judgment appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.



**BROWN v. STANDARD ACC. INS. CO. OF
DETROIT, MICH.***
Civ. 8472.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1935.

Rehearing Granted March 29, 1935.

1. Trial ☞178

Directed verdict may be granted defendant only when there is no evidence sufficiently substantial to support verdict for plaintiff, disregarding conflicting evidence, giving plaintiff's evidence all value to which it is legally entitled, and indulging every legitimate inference therefrom.

2. Insurance ☞668(11)

Physician's testimony, in action on accident insurance policy, that paralysis of certain muscles of plaintiff's body was due to intercranial hemorrhage, caused by traumatic injury to plaintiff's head, held sufficient to take such question to jury.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Oliver Roscoe Brown against the Standard Accident Insurance Company of Detroit, Michigan. Judgment for defendant, and plaintiff appeals.

Reversed.

Sheridan, Orr, Drapeau & Gardner, of Ventura, for appellant.

Paul Nourse, of Los Angeles, for respondent.

PER CURIAM.

By the terms of a policy of insurance plaintiff was insured by the defendant "against loss resulting from bodily injuries effected directly, exclusively and independently of all other causes through accidental means." At a time when such policy of insurance was in effect, from an automobile accident plaintiff suffered a "bump" that "formed up here on the top of * * * (his) head" which plaintiff claimed resulted in a paralysis as to certain muscles of his body, and on account of which he brought an action to recover damages from the defendant in accordance with the provisions of said insurance policy.

On the trial of the action a doctor, who was called in behalf of plaintiff, testified that in his opinion such "paralysis was due to intercranial hemorrhage" that was caused by "traumatic injury to the head." Following the close of the introduction of evidence by the respective parties to the action, on motion of the defendant the trial court ordered a directed verdict by the jury. It is from the judgment that ensued from the return of such verdict that the instant appeal is taken.

[1] Although on cross-examination of the doctor who gave the testimony to which reference hereinbefore has been had the doctor somewhat modified his former statement with reference to the cause of plaintiff's disability, and although other evidence adduced on behalf of the defendant in its effect was decidedly in conflict with the testimony given by the said doctor, nevertheless, as is so clearly set forth in *Estate of Flood*, 217 Cal. 763, 768, 21 P.(2d) 579, 580, "It has become the established law of this state that * * * a directed verdict may be granted 'only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence*, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' [Citing authorities.] * * *"

[2] It is apparent that, giving due weight to the emphasized part of the declaration of the law quoted from the cited case, the testimony given in behalf of plaintiff was "of sufficient substance to support a verdict."

The judgment is reversed.



4 Cal.App.2d 558

ALLEN v. RAINEY, Superintendent of Banks. Civ. 8944.

District Court of Appeal, Second District,
Division 1, California.

Feb. 14, 1935.

1. Courts ⇨259

Statute providing that court may authorize appointed fiduciary to deposit money in any bank, and that such deposit shall be repaid only upon order of court and shall be a preferred claim against such bank, *held* not to apply to fiduciary appointed by federal court (St. 1909, p. 98, § 51).

2. Trusts ⇨221

Generally fiduciary is personally liable for money deposited by him in bank which becomes insolvent, unless evidence shows that he was not negligent in so doing, and, in absence of order of court, deposit of trust funds in bank is not warranted as an investment.

3. Banks and banking ⇨80(7)

Federal receiver's successor could not claim preference as to federal receiver's deposit in state bank because of approval of receiver's accounts by court, even if statute providing for preference applied to federal receiver, since approval constituted no withdrawal of money "by the further order of the court" within statute providing that court may authorize fiduciary to deposit money until further order of court in any state bank (St. 1909, p. 98, § 51).

[Ed. Note.—For other definitions of "Further Order of Court," see Words & Phrases.]

4. Banks and banking ⇨129

When customer deposits money in bank in ordinary course of business, title to money passes to bank upon implied contract that bank will repay amount upon checks of depositor, and, unless there are stipulations to contrary, deposits become part of bank's general funds and can be loaned as such.

5. Banks and banking ⇐80(7)

Federal receiver's successor *held* not entitled to preference as to receiver's deposit in closed state bank, where it did not appear that there was intention to bring deposit within state law and bank had no notice that preference was claimed (St. 1909, p. 98, § 51).

6. Banks and banking ⇐80(7)

Superintendent of closed state bank could not be compelled to pay to federal receiver's successor as preferred claim receiver's deposit on ground that bank had constructive notice of character of deposit because it was made by fiduciary (St. 1909, p. 98, § 51).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus petition by R. E. Allen, as trustee in bankruptcy of the estate of Miramar Properties, Incorporated, bankrupt, against Edward Rainey, Superintendent of Banks for the State Banking Department of California. From an order directing the writ of mandate, the Superintendent appeals.

Reversed.

Sullivan, Roche, Johnson & Barry, of San Francisco, for appellant.

Francis B. Cobb and Ernest U. Schroeter, both of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

The superintendent of banks was directed by a writ of mandate to pay the deposit of a federal receiver in the Bank of Santa Monica, in liquidation, as a preferred claim. He appeals from the order directing the writ, making no issue on the question of whether or not mandate is a proper remedy. The case was tried on an agreed statement of facts.

W. W. Mines was by order of the United States District Court appointed and thereafter qualified as receiver of Miramar Properties, Inc. He presented to the bank a copy of the order appointing him, whereupon the bank transferred the sum of \$3,374.97 standing on its books to the credit of the corporation to a commercial account in the name of the receiver. A few days later he presented to the district court a petition in which he stated: "I am the duly appointed, qualified and acting receiver in the above entitled action and as such receiver am in possession of certain funds belonging to the receivership estate which funds I have on deposit in the Marine Bank of Santa Monica, a national banking association, at its Head Office in San-

ta Monica, and a portion of which funds I expect to have on deposit in the Main Office of the Citizens National Trust & Savings Bank, a national banking association, in Los Angeles, California. Now Therefore I Pray That This Court Make Its Order approving my deposit of the said funds in the said banks and designating the Head Office of the Marine Bank of Santa Monica and the Main Office of the Citizens National Trust & Savings Bank, Los Angeles, as depositories for the funds in my possession as such receiver in the above entitled action." Upon a hearing of the petition the court made its order: "That the deposit of W. W. Mines of funds in his possession as receiver in the above entitled action in the Head Office of the Marine Bank of Santa Monica and funds which he may expect to have on deposit in the Main Office of the Citizens National Trust & Savings Bank, Los Angeles, be and they hereby are approved; and that the said Head Office of the Marine Bank of Santa Monica and the Main Office of the Citizens National Trust & Savings Bank, Los Angeles, be and hereby are named as depositories for the funds in the custody of the said receiver." No notice of the filing of the petition or the order thereon was ever given to the bank.

Mr. Mines continued as receiver until after the superintendent of banks took possession of the Bank of Santa Monica for the purpose of liquidating it. At the time the bank went into liquidation he had on deposit in the commercial account opened by him at the time of his appointment the sum of \$24,485.16. He duly filed his claim against the commercial account of the bank for the payment of the deposit in full under section 51 of the Bank Act (St. 1909, p. 98), which provides: "Any court having appointed and having jurisdiction of any executor, administrator, guardian, assignee, receiver, depository, or trustee, upon the application of such executor, administrator, guardian, assignee, receiver, depository or trustee, or upon the application of any person having an interest in the estate administered upon by such officer or trustee, after notice to other parties in interest as the court may direct, and after a hearing upon such application, may authorize such officer or trustee to deposit any money then in his hands as such officer or trustee or which may thereafter come into his hands, and until the further order of the court, in any bank organized under the laws of the state of California; and upon such deposit being made, the officer or trustee so depositing the same shall there-

after and while such moneys remain on deposit in such bank, be relieved and discharged from all liability and responsibility therefor, and the bond required of such officer or trustee given upon his appointment shall be thereupon by said court reduced to such an amount as the court may deem reasonable; such deposit shall be repaid only upon the orders of said court, and shall be a preferred claim against such bank and be paid in full before any other depositor of such bank shall have been paid." Deering's Gen. Laws (1931 Ed.) Act 652.

After the filing of this claim, which was rejected by the superintendent of banks, Miramar Properties, Inc., was adjudged bankrupt and respondent, as its trustee in bankruptcy, is the successor in interest of the receiver.

The appellant contends that the provisions of the Bank Act quoted are not applicable to a fiduciary appointed by or acting under the authority of a federal court, and that it appears from the petition of the receiver and the order thereon that it was not intended that the benefits of this section would be invoked. It is also urged that the bank cannot be charged with a preferred deposit without notice of its character.

[1] The Legislature of California cannot provide for procedure in United States courts. It cannot direct that the bond of a fiduciary appointed by a federal court shall be reduced or fixed in any particular way or at all. It cannot provide for the procedure to be taken in a federal court by an officer of that court to secure approval of his proposed acts with the assets under his control. It cannot fix the conditions under which such receivers or trustees may be relieved and discharged from liability and responsibility for funds in their charge. In the very early case of *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 10 L. Ed. 1060, 1090, the Supreme Court of the United States said: "For, if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere, and as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is, as the direct provisions made by it." Under these

familiar rules the law in question cannot apply to fiduciaries appointed by federal courts.

[2] We agree also with appellant's contention that it does not appear from the petition and the order made thereon that there was any intention to bring the deposit within the terms of the state law. It is the general rule that a fiduciary is personally liable for money deposited by him in a bank which becomes insolvent unless the evidence shows that he was not negligent in so doing. "Likewise, it appears to be in accord with many authorities that, *in the absence of an order of court permitting it*, such a deposit of trust funds in bank is not warranted as an investment, but only for temporary purposes pending investment, such a deposit as an investment being held to be a loan to the bank on personal security only, a kind of investment not considered by such authorities as one ordinarily proper to be made in the exercise of due care." In *re Estate of Wood*, 159 Cal. 466, 471, 114 P. 992, 993, 36 L. R. A. (N. S.) 252. Prudent trustees therefore are careful to obtain express approval for the deposit of funds in their care. Mr. Mines' petition was to approve his deposit and designate a depository. The order of the court shows that its only purpose was to approve the depository.

[3] It was nowhere suggested in the petition or the order that the bond of the trustee should be reduced in any amount by such deposit, and there is no provision for withdrawal of the funds by order of the court. During all of the time from the making of the order to the closing of the bank Mr. Mines treated the account as an ordinary checking account, and he never asked for nor received approval of any of his acts in connection therewith. The approval of his accounts by the court constitutes no withdrawal of the money "by the further order of the court" as the statute provides. He, or his successor, cannot now claim the benefits of the law, even if we assume that a trustee appointed by a federal court might come within its provisions.

[4, 5] Also, it would be highly inequitable to hold the bank liable as on a special or preferential demand when it had no notice that any preference was claimed. When a deposit is made by a customer in a bank in the ordinary course of business, title to the money passes to the bank upon an implied contract on the part of the bank to repay the amount upon the checks of the depositor. Unless there are stipulations to the contrary, the deposits become part of its general funds and can be

loaned as such. Plumas County Bank v. Bank of Rideout, Smith & Co., 165 Cal. 126, 131 P. 360, 47 L. R. A. (N. S.) 552; Wood v. Imperial Irrigation District, 216 Cal. 748, 17 P. (2d) 128. If the depositor seeks to place special conditions upon his deposit, there must be some agreement between him and the bank as to what they shall be. The bank may not wish to accept deposits having special conditions or preferences and it certainly has a right to refuse them. Furthermore, other depositors have a right to be protected against preferences claimed by a depositor but never agreed to by the bank. These principles are elementary.

[6] But it is contended that the bank had constructive notice of the character of the deposit, because it was made by a fiduciary. If that were true every deposit made by any fiduciary would be a preferred deposit, a situation which the statute neither contemplates nor authorizes.

The order is reversed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.



4 Cal.App.2d 676

**CALVARY PRESBYTERIAN CHURCH OF
SOUTH PASADENA et al. v.
BRYDON.
Civ. 9320.**

District Court of Appeal, Second District,
Division 2, California.
Feb. 20, 1935.

Hearing Denied by Supreme Court
April 18, 1935.

1. Subscriptions ⇨5

Defendant's note subscribing to church building fund held supported by consideration, where subscriptions were taken from members who mutually obligated themselves so as to substitute individual obligations for general liability previously assumed by indorsers, including defendant of larger note, and where purchases had been made in reliance on defendant's subscription.

2. Evidence ⇨413

Obligation of note representing a subscription to church building fund could not be varied by soliciting agent's statement that obligation would be canceled if subscriber

transferred his membership to another church.

3. Limitation of actions ⇨184

Amendment to answer setting up on information and belief that action was barred by statutes of limitation, without citing any code section relied on, held insufficient plea of limitation.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the Calvary Presbyterian Church of South Pasadena, Cal., and others against Robert W. Brydon. Judgment for plaintiffs, and defendant appeals.

Affirmed.

G. M. Grant, of Los Angeles, B. F. Tyler, of San Diego, and George W. McDill, of Los Angeles, for appellant.

William Hazlett and Derthick, Cusack & Ganahl, all of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiffs recovered judgment against defendant, a former member, for an unpaid balance on a church building fund subscription which was evidenced by an installment promissory note executed by the latter.

[1] Defendant was one of a number of members of plaintiff church who at an earlier date had indorsed a note for an amount far in excess of the amount of the note here sued on, the proceeds of the former note being used to erect and furnish a building where the congregation could gather for worship. Subscriptions were solicited among the members, who mutually obligated themselves so that individual obligations would be substituted for the general liability which the indorsers of the larger note, including defendant, had assumed. In addition thereto, after defendant had signed the personal note, certain purchases were made in reliance upon his promise to pay. The consideration thus afforded was sufficient to support such promise. University of Southern California v. Bryson, 103 Cal. App. 39, 283 P. 949.

[2] It is contended that certain soliciting agents hired by the church of which defendant was a member said that if defendant at some later time transferred his membership to another church, the obligation would be canceled. We see no theory upon which weight or validity could be attributed to such utterances sufficient to vary the express

terms of a written instrument. They were at the most an exposition of a layman's idea as to the legal effect of the document or obligation, or a prophetic declaration as to how the church membership at some future time and as then constituted would respond to his prayer that they forgive him this debt. The record shows that when the church by its vote, approved by the superior ecclesiastical body, permitted defendant to transfer his spiritual allegiance to another church, they adopted and sent to him, together with his church letter, a resolution suggesting that they would expect him to pay the balance on his pledge as evidenced by the note in question.

[3] Suit herein was filed May 21, 1930. On date of trial, January 10, 1933, defendant asked leave to file certain amendments to his answer setting up the defense on information and belief that the action "is barred by the statutes of limitation," without citing any section of the code upon which he relied. Such an amendment, even if permitted, would not be a sufficient plea of the statute of limitations to bar the present action. *Hannah v. Canty*, 175 Cal. 763, 167 P. 373; *Cohn v. Goodday*, 191 Cal. 615, 217 P. 756. In view of the admissions of defendant at the trial, we conclude that the above and other proposed amendments thus tardily offered would not have opened the way to admitting evidence essentially favorable to defendant, and that the refusal of the trial court to allow the amendments or admit evidence offered pursuant thereto was a proper exercise of its discretion and not prejudicial to the substantial rights of defendant. We are mindful of the fact that defendant debtor was a member of the church which was creditor, and, as a large contributor, occupied a distinctive place among the church membership which was in some respects one of trust and confidence, and that forbearance by the creditor to insist on payment might be assumed to have been induced at least in part by the debtor's conduct and words. Such obligations, which are spiritual as well as financial, involve considerations which are not subject to strict admeasurement by legal yardsticks, but require interpretation in the light of all the circumstances of the case.

Various instructions declaring the defendant's view of the law were withheld from the jury. It appears from the court's delineation of the legal principles which the jury were to apply that they would not have been aided by the giving of this added exposition of defendant's theory. They were correctly

told everything they needed to know about the law to enable them to properly decide the case.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 692

**BEATTY v. PACIFIC STATES SAVINGS
& LOAN CO.**
Civ. 9224.

District Court of Appeal, Second District,
Division 2, California.

Feb. 21, 1935.

Rehearing Denied March 15, 1935.

Hearing Denied by Supreme Court
April 22, 1935.

1. Pleading ⇨406(8)

Failure to demur to misjoinder of action for breach of contract with tort action for conversion operates as waiver of defect (Code Civ. Proc. §§ 427, 430).

2. Pleading ⇨53(1)

Cause of action arising out of one transaction may be separately stated in different ways even though they are inconsistent with each other (Code Civ. Proc. §§ 427, 430).

3. Pleading ⇨53(1)

Rule which permits pleading of inconsistent causes of action in same complaint was not intended to sanction statement in verified complaint of certain facts as constituting a transaction in one count and in another count a statement of contradictory facts as constituting same transaction.

4. Pleading ⇨34(6), 406(8)

Where complaint to recover for same transaction joined action for breach of contract with tort action for conversion and defendant failed to demur thereto, court, after close of evidence, must decide which cause had been sustained and must take as true averments which bore most strongly against pleader and were sustained by evidence or admissions.

5. Trial ⇨396(7)

Finding adverse to allegations in complaint which were unqualifiedly admitted by answer should be disregarded in determining whether proper conclusion of law was drawn from facts found and admitted, since allegations not controverted are conclusive (Code Civ. Proc. § 462).

6. Trial $\Rightarrow$ 396(7)

Where complaint alleged that transaction was both a sale of security with option to repurchase and also a pledge and asked for damages for breach of contract and for conversion, finding that transaction was a sale must be disregarded, where evidence disclosed and answer admitted transaction constituted a pledge (Code Civ. Proc. § 462).

7. Pledges $\Rightarrow$ 36

Where complaint alleged that transaction was both a sale of security with option to repurchase and a pledge and asked for damages for breach of contract and for conversion, and evidence disclosed and answer admitted that transaction constituted pledge, only issue was whether pledgee had converted property (Code Civ. Proc. § 462).

8. Mortgages $\Rightarrow$ 245

Pledgee of notes, which contained acceleration clauses and were secured by trust deeds, who, in absence of fraud or agreement to the contrary, declared notes due pursuant to acceleration clause, foreclosed trust deeds, and purchased security, *held* not guilty of conversion, but must account to pledgor for proceeds (Civ. Code, § 3006).

9. Mortgages $\Rightarrow$ 245

Pledgee may collect notes pledged as security by foreclosing mortgages given to secure notes, but cannot otherwise sell or release debt or security without becoming liable for conversion.

Appeal from Superior Court, Los Angeles County; Georgia Bullock, Judge.

Action by W. D. Beatty against the Pacific States Savings & Loan Company. From a judgment in favor of plaintiff, defendant appeals.

Reversed and remanded.

John L. Mace, of Los Angeles (Arch R. Tut-hill, of Los Angeles, of counsel), for appellant.

Robert F. Shippee and D. F. Wisdom, both of Los Angeles (Silverberg & Gilford, of Los Angeles, of counsel), for respondent.

WILLIS, Justice pro tem.

This is an appeal from a judgment for money, founded on a verified complaint containing two separate causes of action. In the first cause respondent alleged that he sold to defendant for \$2,500 two notes, each secured by a trust deed, with a written option to repurchase within a specified time, which option agreement, made a part of the complaint

and marked "Exhibit A," was breached by appellant to his damage in the sum of \$6,312.16. In the second cause he alleged that he borrowed \$2,500 from appellant and assigned the same notes and trust deeds as security for its repayment, which appellant agreed, in the writing marked "Exhibit A," to reassign and deliver upon payment of the said sum with interest within a certain time. He further alleged "that while said written agreement as shown by exhibit 'A' purports to be an absolute sale, in truth and in fact said promissory notes and deeds of trust securing the same were assigned and delivered to appellant by respondent merely as a pledge for the payment of said loan with interest, which might be redeemed at any time up to 5 o'clock p. m. the 20th day of November, 1932, that being the intention and understanding of the parties"; that he offered to redeem and demanded said notes and trust deeds on October 7, 1932, which offer was rejected and which demand was refused; that appellant had converted said notes and trust deeds to its own use; and that because thereof respondent had been damaged in the sum of \$6,312.16.

In its answer appellant denied that respondent sold said notes and trust deeds to it, and also denied the other allegations of the first cause of action above referred to. As to the second cause, by failing to deny, appellant admitted all the allegations relating to the loan and pledge and the character and purpose of the agreement marked "Exhibit A." It also admitted it agreed to reassign the notes, but denied that it agreed to reassign the trust deeds, and denied all other allegations in the second cause above referred to.

Upon these pleadings and the evidence, the court found that respondent "sold, assigned and delivered" the notes and trust deeds to appellant, who agreed in writing to resell them to respondent as provided in Exhibit A; that on February 11, 1932, appellant had caused default to be declared on said notes under accelerating clauses therein, and had caused sales to be made under trust deeds, at which appellant became purchaser for the sum of \$1,200 on each thereof; that as a result said trust deeds became of no value; that on October 7, 1932, respondent offered to pay the sum of \$2,500 with accrued interest, and demanded the notes and trust deeds, but that such offer was rejected and such demand refused; that at such date and subsequently, respondent was ready, able, and willing

to comply with said agreement, but that appellant, after February 11, 1932, was not able or willing to perform the terms thereof by reason of said sales under the trust deeds; that said notes and trust deeds were reasonably worth the sum of \$8,000; that the makers of the notes are insolvent, and that by reason of said sales said notes became of no value; that appellant is entitled to the sum of \$2,500 and accrued interest, under said agreement. The court further found "that all the allegations contained in plaintiff's complaint are true and that the allegations and denials in the defendant's answer and in its amended answer are untrue or immaterial."

In its conclusions the court decided that appellant had breached the written contract; that it had no right or power to declare defaults on the notes and require a trustee's sale under the trust deeds; that it was the duty of appellant to hold itself ready at all times until November 20, 1932, to assign and deliver said notes and trust deeds in the same condition as when received; that the foreclosure of the trust deeds "was and is a conversion of said deeds of trust to the use and benefit of defendant, and was and is a breach of said agreement of November 20, 1932"; "that plaintiff is entitled to recover from the defendant as damages for such breach of contract and for the conversion of said deeds of trust" the difference between the sum of \$8,000 with certain interest and the sum of \$2,500 with accrued interest. Judgment was thereafter entered for the sum of \$6,617.14, which correctly represents such difference.

From the judgment defendant has appealed, and contends that the findings are inconsistent and contradictory, that the evidence fails to support the finding that respondent sold said notes to appellant, and that the conclusions are contrary to law.

[1-3] At the outset of our consideration of the questions raised herein we are confronted with a complaint in which two causes of action are improperly joined; for a cause of action for damages for breach of contract may not be joined with a tort action for conversion of personal property. Code Civ. Proc. § 427; Stark v. Wellman, 96 Cal. 400, 31 P. 259. But such misjoinder may be attacked only by demurrer (Code Civ. Proc. § 430), and, in the absence of such demurrer, such defect is deemed to have been waived. There being no demurrer in the record herein, we must consider the complaint in the light of other rules applicable. It is obvious that the two causes of action contain inconsistent and, in-

deed, antagonistic statements of fact, under verification. It has, however, long been held that the cause of action arising out of one transaction may be separately stated in different ways, even though they are inconsistent with each other. *Stockton, etc., Wks. v. Glens, etc., I. Co.*, 121 Cal. 167, 53 P. 565. And in one case at least it has been held that, where two causes of action arose out of the same transaction, even though they were antagonistic, yet they could be pleaded in the same complaint, and an election may not be ordered in such case. *Cameron v. Ah Quong*, 175 Cal. 377, 165 P. 961. A clear and comprehensive statement of the rules applicable in cases of inconsistent causes of action is found in *Tanforan v. Tanforan*, 173 Cal. 270, 159 P. 709, wherein it is stated that our simplified method of pleading, which requires merely a statement of the ultimate facts, will not often render it necessary to a complaint to charge in inconsistent counts; but, when for any reason the pleader thinks it desirable so to do, as where the exact nature of the facts is in doubt or where the exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to the plaintiff, his pleading may set forth the same cause of action in varied and inconsistent counts with strict legal propriety; the plaintiff is entitled to introduce his evidence upon each and all the causes of action, and the decision as to which of them is sustained is, after taking all the evidence, a matter for the judge or jury. Consistent with the rule thus announced and additional thereto, it had been previously held, in the case of *Bell v. Brown*, 22 Cal. 671, that, where the truth of a fact is directly averred in any part of a verified complaint, and in another part of the same pleading the same fact is directly controverted or denied, the party verifying it is guilty of perjury; for both cannot be true, and the averment which bears most strongly against the party so pleading will be taken as true upon the trial. The strict application of this statement as affecting antagonistic averments of fact in answers was limited in the later cases of *Buhne v. Corbett*, 43 Cal. 264, and *Banta v. Siller*, 121 Cal. 414, 53 P. 935, to averments of any single separate defense, and was held not applicable to the whole of any answer which contains different, distinct, and separate defenses. We do not think, however, that the rule permitting the pleading of inconsistent causes of action in the same complaint was ever intended to sanction the statement in a verified complaint of certain facts as constituting a transaction in one count or cause of action, and in another count

or cause of action a statement of contradictory or antagonistic facts as constituting the same transaction. In short, the rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts of which he purports to speak with knowledge under oath.

[4] Under the rules above stated, it became the duty of the trial court herein, upon the close of the evidence, to decide which of the antagonistic causes of action had been sustained, and in so deciding the court was required to take as true the averments in the complaint which bore most strongly against the pleader and which were sustained by proofs either in the form of evidence or admissions of the pleadings.

[5] The undisputed testimony of the respondent clearly revealed that the transaction in question was not one of sale of the notes and trust deeds with option to repurchase, but was one of loan, secured by a pledge of the notes and trust deeds with right to redeem. The admissions created by the averments of the second cause of action and the answer thereto were strictly in conformity with respondent's testimony and other corroborating evidence. Section 462 of the Code of Civil Procedure provides that every material allegation of the complaint not controverted by the answer must, for the purpose of the action, be taken as true. Where a complaint contains allegations of fact which are distinctly and unqualifiedly admitted by the answer, there is no issue as to those facts. The allegations of facts being admitted, they are conclusive. If the court finds adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. *Welch v. Alcott*, 185 Cal. 731, 754, 198 P. 626; *Economy Home Builders, Inc.*, v. *Berry*, 95 Cal. App. 106, 272 P. 307; *Faulkner v. Rondoni*, 104 Cal. 140, 37 P. 883.

[6] The court found that respondent sold the notes and trust deeds to appellant with written option to repurchase. By its general finding that all the allegations of the complaint were true, it found that the transaction was not a sale, but a loan with pledge of the notes and trust deeds as security, with written provision to redeem under conditions. This last finding is in accord with the admissions of the pleadings and with the undisputed evidence. It follows, therefore, that the finding that the transaction constituted a sale must be disregarded, and as a

consequence the conclusions of the court based thereon must be held to be unsupported and contrary to the findings.

[7] Upon the record, when the cause was submitted for decision, the first cause of action based on the sale theory stood unsupported for the reasons above given, and the second cause stood on the admissions which determined that the transaction constituted a loan with pledge; and the only issues of fact to be determined under the evidence were whether appellant had committed any acts which amounted to conversion of the pledged property, and, if so found, the amount of damage caused thereby. The court in that respect found that on February 11, 1932, appellant had without necessity accelerated the due dates on the pledged notes, caused default thereon to be declared and sales by the trustees under the respective trust deeds to be had. These acts the court concluded constituted a conversion of the trust deeds and a breach of the redemption agreement, and ordered judgment for the value of the notes and trust deeds less the amount of the loan indebtedness.

[8, 9] Under the facts as found by the court in respect to the declaration of default on the notes and sales under the trust deeds, it was error to conclude that appellant had converted the trust deeds. As pledgee, appellant was forbidden by law to sell the notes pledged by respondent, but it was authorized to collect them when due. Civ. Code, § 3006. And being holder of the notes as pledgee, appellant had the right to exercise the option therein contained in the acceleration clause to declare the notes due for failure to pay interest according to the terms thereof. *Patten v. Pepper Hotel Co.*, 153 Cal. 460, 96 P. 296. Having declared the notes to be due, appellant had, in the absence of agreement to the contrary, the right to foreclose the security and become the purchaser; and, if such is done, and no fraud is shown, appellant takes absolute title to the property and must account to respondent for the proceeds. *Kelly v. Matlock*, 85 Cal. 122, 24 P. 642; *Hoult v. Ramsbottom*, 127 Cal. 171, 59 P. 587; *Johnson v. Mortgage Guarantee Co.*, 117 Cal. App. 416, 4 P.(2d) 208. A collection on notes pledged as security, after default in their payment, may be had by foreclosure proceedings on mortgages given to secure them, and such action does not constitute conversion. *McArthur v. Magee*, 114 Cal. 126, 45 P. 1063; 21 Cal. Jur. 336. But if the pledgee sells or releases the debt or security otherwise than upon collection, the pledgor may set aside

the sale or release, if other circumstances permit, or hold the pledgee for conversion. *Revert v. Hesse*, 184 Cal. 295, 193 P. 943.

Whether the agreement of November 20, 1930, evidenced in part by Exhibit A, constituted a bar to sales under the trust deeds, we do not herein decide. Upon another trial, with issues properly joined in amended pleadings upon a cause of action for breach of the pledge agreement, evidence may be taken and decision may be made as to whether appellant is liable in damages for its acts in causing the sales to be made in violation of such agreement as established by evidence or is bound only, upon performance of the offer of October 7, 1932, which we conclude was a sufficient and valid offer of performance, to redeliver the notes and to account for collections thereon.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this decision.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 624

THOMPSON v. THOMPSON.

Civ. 9284.

District Court of Appeal, Second District,
Division 2, California.

Feb. 18, 1935.

Hearing Denied by Supreme Court
April 18, 1935.

1. Husband and wife ⇨278(5)

Divorced husband's voluntary contract to make certain payments to former wife, whom he had deserted, *held* supported by consideration.

2. Husband and wife ⇨281

That divorced wife had failed to make will providing that moneys to be paid to her by former husband should go to charity if wife died before specified date *held* no defense to wife's action for moneys due under the contract, where action was not filed until after such specified date.

Action by Mary L. Thompson against Edward J. Thompson. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

W. C. Dalzell, of Los Angeles, for appellant.

Morin, Newell, Brown & Hamill, of Pasadena, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment on a written contract. Defendant appeals.

The parties to this action were formerly husband and wife. For nearly twenty-four years they lived together, after which defendant deserted plaintiff and a divorce was obtained by the latter in Pennsylvania. Following the separation the contract was entered into which furnished the basis of the judgment in the instant case. It provided for payment of interest in monthly installments, which defendant kept up for eight years; and an option for acceleration in payment of principal if interest was not so paid when due, which option was exercised by plaintiff so as to bring this action.

[1] Appellant urges six points in his behalf. Five relate to the sufficiency of the consideration for and the execution of the contract in question. It is not questioned that appellant freely and voluntarily entered into the obligation for the payment of the sum in question to his wife after she had secured a divorce and that he had not made the payment therein provided, but had uncomplainingly paid interest thereon when due. The questions here raised were presented to the trial court and decided adversely to appellant's contentions on evidence which is convincing. If there were any serious conflict the trial court would have been warranted in upholding the right of the unoffending wife as against her former spouse whom the Pennsylvania court found had during fifteen years prior to their separation "periodically wandered off to browse in strange pastures."

[2] The sixth point is an objection that plaintiff had agreed to execute a will providing by the terms thereof that if she died prior to November 1, 1932, the balance of the money to be paid under the contract should go to a charitable institution, and if she failed to make such a will defendant on her death should be released from this obligation. It has not been suggested that plaintiff has died, and such a provision made in express contemplation of a situation which would arise

Appeal from Superior Court, Los Angeles County; Oda Faulconer, Judge.

only if she died prior to November 1, 1932, would be ineffectual.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 91

PEOPLE v. MENNE.
Cr. 1387.

District Court of Appeal, Third District,
California.

Jan. 24, 1935.

Rehearing Denied Feb. 8, 1935.

Hearing Denied by Supreme Court Feb.
21, 1935.

1. False pretenses ⇨41

Evidence that defendant, charged as principal with issuing and passing fictitious checks through accomplice, had prepared way for payee's acceptance of checks by representing to payee that third person, claimed to be accomplice, would give good checks in payment for payee's produce, *held* admissible (Pen. Code, § 476).

2. Criminal law ⇨511(2)

Testimony relied on to corroborate accomplice must tend to connect defendant with offense.

3. Criminal law ⇨511(1)

Evidence in prosecution for issuing and passing fictitious checks and for conspiracy *held* sufficient to corroborate testimony of accomplice through whose hands the checks were passed (Pen. Code, §§ 182, 476, 1111).

4. Criminal law ⇨561(2)

People in prosecution for issuing and passing fictitious checks and for conspiracy need not prove beyond reasonable doubt that no persons anywhere existed under names signed in checks, but proof of such fact to common certainty was sufficient (Pen. Code, §§ 182, 476).

5. Conspiracy ⇨47

False pretenses ⇨49(3)

Evidence in prosecution for issuing and passing fictitious checks and for conspiracy *held* sufficient to establish corpus delicti and fictitious character of checks (Pen. Code, §§ 182, 476).

6. Criminal law ⇨112(5)

In prosecution of defendant as principal for issuing and passing fictitious checks through an accomplice, venue *held* properly laid in county where checks were passed, though defendant was not personally present (Pen. Code, §§ 476, 792).

7. Conspiracy ⇨43(6)

False pretenses ⇨49(3)

Information charging, in prosecution for issuing and passing fictitious checks and for conspiracy, that checks purported to be those of certain produce companies and that no such persons, or individuals or firms, or corporations or copartnerships were in existence, *held* sufficient (Pen. Code, §§ 182, 476).

8. Criminal law ⇨706

Conduct of assistant district attorney in asking that defendant's wife who was upon witness stand be called or considered as witness for people, though improper, *held* not reversible error.

9. Jury ⇨136(6)

Defendant, charged in separate counts of information with issuing and passing four separate fictitious checks, *held* not entitled to number of challenges which would have been allowed in case of separate trials.

10. False pretenses ⇨43(1)

Testimony of officers of drawee banks that banks had no accounts in names of drawers of checks *held* admissible in prosecution for issuing and passing fictitious checks (Pen. Code, § 476).

11. Criminal law ⇨508(1)

Excluding inquiry of accomplice witness as to how he expected case to terminate as to him *held* not error, in prosecution of principal in which accomplice testified for people.

12. Criminal law ⇨554

Jury was not required to accept as true uncontradicted testimony of defendant, where there was evidence that defendant's reputation rendered his statements untrustworthy.

13. Criminal law ⇨507(1)

One whom defendant used for passing checks in payment of produce *held* as matter of law an "accomplice," in prosecution for issuing and passing fictitious checks, where defendant was not personally present at time of passing of checks (Pen. Code, § 476).

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

14. Criminal law ⇨1173(2)

Court's error in failing to instruct that people's witness was accomplice as matter of law *held* not reversible error, where case was

tried upon admitted fact that witness was accomplice.

15. False pretenses $\Rightarrow$ 49(3)

In prosecution for issuing and passing fictitious checks, testimony that drawer of check had no account with drawee bank was prima facie evidence of fictitious character of check (Pen. Code, § 476).

16. Criminal law $\Rightarrow$ 200(6)

Count in information charging conspiracy held not merged in first count charging issuing and passing of fictitious check (Pen. Code, §§ 182, 476).

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Charles A. Menne was convicted of issuing and passing fictitious checks and of conspiracy, and he appeals.

Affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowling, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant in this action was convicted on four separate counts of an information charging the issuing and passing of fictitious checks in violation of section 476 of the Penal Code, and also upon one count charging conspiracy based upon section 182 of the Penal Code. The defendant's motion for new trial having been denied, this appeal is prosecuted.

The transcript shows that at the times involved in this action the defendant had residing with him a nephew by marriage named Fred Cutts, of the age of about 16 years. The defendant during all the times mentioned in this action was the owner of a Graham truck, and had previously been engaged in buying and selling farm produce. Cutts was living with the defendant at the defendant's home in the city of Stockton, and according to his testimony worked for Menne in buying, selling, and transporting farm products from farms to market places. In July and August, 1933, it appears that the defendant took the boy Cutts with him, and called upon several farmers in San Joaquin county and made arrangements for buying certain specified parts of their produce, melons, cantaloupes, and sweet potatoes. It also appeared that at different times the defend-

ant and Cutts went to Watsonville, where they secured truckloads of apples, which were marketed in different localities.

In the month of July or August, 1933, the defendant and Cutts visited different ranches, as we have stated, in San Joaquin county. The first rancher mentioned in count 1 of the information was a man by the name of Pimentel, who owned a small tract of land near the city of Stockton. The defendant was well known to Pimentel; having theretofore bought produce from his farm. The defendant introduced Cutts to Pimentel as his nephew; asked Pimentel for quotations on watermelons and cantaloupes, stating to Pimentel that he had discontinued the produce business and that his nephew was going to haul produce for some Sacramento concerns.

A few days after the Pimentel transaction, the defendant and Cutts called at a ranch owned by M. F. Mello, and purchased a quantity of watermelons. The same parties likewise called at the ranch owned by one C. P. Silva, named in the fourth count of the information, and made arrangements to purchase watermelons and sweet potatoes. The fifth count in the information charges conspiracy to pass fictitious checks, etc.

The boy Cutts became a witness for the state, related all the details of the transactions to which we have referred, and the circumstances connected with the commission of the several offenses and testified that the defendant gave him for use the four fictitious checks passed by him.

Upon this appeal it is contended by the appellant that there is not sufficient corroborating testimony, as required by section 1111 of the Penal Code, to connect the defendant with the commission of the offenses with which he is charged.

Two checks were passed upon Pimentel, furnishing the basis for counts 1 and 2 of the information. These checks are in the following words and figures:

"Clearing House No. 10	No. 191
"Sacramento, California, July 5/1933	192
"Pay to the order of M. Pimentel \$27.50	
Twenty-seven Dollars—fifty—Dollars, to the	
Citizens Bank of Sacramento, Commercial-	
Savings, 90-645 Sacramento, California.	
"McCann Produce Co.	
"By J. S. McCann."	

"Clearing House No. 10	No. 190
"Sacramento, California, July 5/1933	192
"Pay to the order of M. Pimentel 25.00	
Twenty-five Dollars Dollars, to the Citizens	

Bank of Sacramento, Commercial-Savings, 90-645 Sacramento, California.

"McCann Produce Co.

"By J. S. McCann."

We quote the following from the testimony of Pimentel in relation to the two checks just set forth:

"Q. Tell the court what you said to Mr. Menne, and what Mr. Menne said to you when he came down there, in the presence of the people you have indicated? A. He came to the place and introduced the boy to me, and said he was not going to buy and haul any crops that year, but the boy was going to do it with his own truck, and it was a good Sacramento Company and good checks, and everything.

"Q. Did Mr. Menne say anything to you there? A. He said he was going around to see the things, and then he would come back a little later. Then, when I came home that night there was a little note home—I think my little girl said the boy delivered it—he wants three tons of watermelons for the next day."

Thereafter, Cutts called at the Pimentel ranch with the Graham truck belonging to the defendant, and received two loads of watermelons and cantaloupes. The watermelons were of the striped variety known as the rattlesnake melons. Cutts testified that Menne took possession of both loads of watermelons. In payment of the first load Cutts gave to Pimentel the first check which we have set forth. As payment for the second load the second check which we have set forth was given to Pimentel. Upon cross-examination Pimentel testified as follows:

"Q. Who opened the conversation? A. Well, Mr. Menne started first, and then they started talking together.

"Q. Did he take part in the conversation, or did he say anything? A. Menne introduced the boy to me.

"Q. Did he introduce him by the name of 'Fred Cutts' or 'Freddie'? A. I don't remember.

"Q. Have you any recollection as to the name under which he introduced him? A. Well, he said something, that he was his nephew, or something like that.

"Q. And after he introduced him to you what did Mr. Menne say? A. 'The boy is going to run the truck' he said; he was not going to run it back here; he has a good job; he is making \$200. a month in some business, and the boy is going with the truck from Sacramento from the same houses he bought

for before, and he was going to bring the checks right from the houses.

"Q. What was the full conversation? A. He asked first how much the melons were, the price, and then I told him.

"Q. Menne said, then, as I understand you, that the Cutts boy was working for a Sacramento firm that he had been working for for two years? A. No; the boy is going to haul the truck up there, a good house in Sacramento, the same place that he used to haul to before.

"Q. Did he say who they were? A. No.

"Q. What did he say about the checks? A. That he was going to bring the checks right to me in my name.

"Q. Just what language did Menne use? A. He said, 'He will bring the checks made out in your name.'

"Q. Did he (Menne) use the words 'Cutts'? A. Well, he said 'the boy.'

"Q. He pointed to the boy and said, 'The checks will be made out in your name?' A. Yes.

"Q. Did he say they were going to be 'good checks'? A. Yes; I be afraid of the boy to give him the crop, if not.

"Q. He told you they were going to be 'good checks'; he put you wise that the boy was going to give you some 'good checks'? A. Also, he told me in the same way, so that I was not afraid to sell the crop to the boy—"The boy is going to bring you good checks."

"Q. Did he use the words 'good checks'? A. He said, 'The boy is going to bring the checks from a good house in Sacramento, the same place as I hauled to before.'"

Cutts testified that the striped watermelons obtained from Pimentel were taken to Napa and there sold by the defendant. A witness by the name of Thyther testified that she rented a fruit stand to Menne at Napa, and that the defendant sold from the fruit stand the load of striped melons. The defendant admitted selling melons and cantaloupes at Napa, but claimed that he bought them from a man by the name of Manuel Lopes, who lived in the Turlock district. The record shows that a man by the name of Manuel Lopes appeared as a witness for the prosecution, and testified that he sold no such produce to the defendant. A deputy sheriff testified that the Manuel Lopes who appeared as a witness was the only person by that name whom he could locate in the Turlock district.

[1] The contention upon this appeal is that this testimony, and also the testimony relat-

ing to the subsequent transactions which we will set forth, shows only opportunity, and does not tend to connect the defendant with the commission of the offenses. This testimony however, we think not only shows opportunity, but goes farther and lays the foundation for the transactions referred to; has for its purpose the establishment of confidence in the genuineness of the checks which would be made out in the name of Pimentel by the Sacramento houses receiving the produce, and also had for its purpose the foreclosing of any further inquiry by the seller as to his receiving pay for the produce about to be turned over to the possession of the boy Cutts. Thus, the testimony shows not only opportunity, but also participation in the transactions about to be had.

The defendant assured Pimentel that his produce was about to be delivered to a good house which would pay for the produce by checks drawn in the name of Pimentel. Drawn in this manner, of course, Cutts could not obtain any money on the paper.

The foregoing testimony does not show specifically that the defendant encouraged or persuaded Cutts to deliver the two fictitious checks to Pimentel, but it very clearly establishes that he prepared the way for and induced Pimentel to accept whatever checks might be brought to him by the boy Cutts. It also establishes the fact that the defendant had knowledge of the character of the checks, and of the nonexistence of the houses which would issue the checks in the name of Pimentel.

While not aiding or abetting, by any words addressed to Cutts, encouraging him to pass the fictitious checks, it carried the payment part of the transaction up to a point where the fictitious checks would be accepted on the faith of what the defendant had stated.

The witness Grace Thyther testified that she lived about eight miles north of Napa city; that in the month of August, 1933, the defendant and the boy Cutts came to her residence and wanted to rent a fruit stand; that after having a conversation with the defendant she rented the fruit stand to the defendant for two days for the sum of \$3; that he paid her \$1.50 only for the rent of the place; that the defendant sold striped, or what are called rattlesnake watermelons, and also a few muskmelons; that she did not see the defendant after he left the stand; that the boy Cutts was with Menne at the time. The boy Cutts testified that the melons sold in Napa were the melons purchased from Pimentel; that the defendant was at the stand for two days.

The witness Joseph Thyther testified that he was the husband of Grace Thyther, and that his wife rented a fruit stand to the defendant in August, 1933; that he thought it was along about the first part of August; that he fixed the date from the fact that they shortly afterwards, and on the 13th of August, went away on a trip. As we have stated, the witness Manuel Lopes testified that he sold no such produce to the defendant.

There is testimony in the record to the effect that after the Pimentel transaction the truck was repainted a different color, and a license plate which belonged to a "Fageol" truck was substituted for the one that really belonged on the "Graham" truck.

The witness Mello testified that about the 15th of August, the boy Cutts came to his place near Escalon with a truck; that at the time there was some person whom he could not recognize, also on the truck; that it was about 7:30 in the evening; that after the truck stopped he heard talking, but could not understand the conversation. "Following, the boy came into the yard and asked if I had any melons to sell. I said, 'sure.' He asked me if I could sell a couple of tons. I said, 'sure; when do you want them?' The boy said, 'I would like to get them this evening.' I told him it was too late; that he could get them the next morning, and I told him the price—\$13.00 a ton. He came back the next morning."

In payment of the melons Cutts gave Mello the check set forth in count 3, which is in the following words and figures:

"Clearing House No. 10 No. 908

"Sacramento, California, Aug. 16-33

"Pay to the order of M. F. Mello \$25.00
Twenty-five Dollars only Dollars, to the
Citizens Bank of Sacramento, Commercial-
Savings 90-645.

"The Hummell Produce Co.

"By John J. Hummell."

Count 4 relates to the transaction had with C. P. Silva, the owner of a ranch, as we have stated, in San Joaquin county. Mr. Silva's testimony is as follows:

"Q. Did you and Mr. Menne have a conversation there? A. He asked for the stuff and we agreed on the price.

"Q. He asked for the stuff? A. Mr. Menne.

"Q. What did he say? A. I said, 'I have got watermelons and sweet potatoes.'

"Q. Did you give him the price? A. I gave him the price, but I don't remember the price I gave him.

"Q. And when you gave Mr. Menne the price, what did Mr. Menne say? A. He said he was going to bring the boxes for the potatoes, and wanted some watermelons, too.

"Q. Did he say when he was going to do that? A. He said he was going to bring that in the last part of the week,—the boxes.

"Q. How long was Mr. Menne at your ranch at this time? Did he stay there very long? A. Not very long. Mr. Menne came to my place at that time in a car, not in a truck."

The witness Silva testified that in about two days the boy came with the boxes. Mr. Silva further testified that the boy took the boxes of sweet potatoes, but did not take any watermelons. The check given in payment for the sweet potatoes, and constituting the basis of the fourth count in the information, is in the following words and figures, to wit:

"Clearing House No. 10 No. 945

"Sacramento, California, August 19th, 1933.

"Pay to the order of C. P. Silva \$70.00
Seventy Dollars only Dollars, to the Citizens' Bank of Sacramento, Commercial-Savings, 90-645 Sacramento, California.

"The Clark Produce Co.

"A. W. Clark Pay Roll Account,
"By A. W. Clark."

Following the obtaining of the sweet potatoes, the boy Cutts testified that the defendant and himself took the sweet potatoes to the town of Jackson and there disposed of the same.

The witness Mrs. Katie Perovitch, called as a witness for the prosecution, testified that in August, 1933, she was residing in the town of Jackson; that in August, 1933, she saw the defendant at her place selling fruits and vegetables; that at said time she bought some sweet potatoes and cabbages from the defendant; might have bought some oranges and lemons; but did not remember; that she did not exactly remember the number of boxes of sweet potatoes she bought, but she thought she got ten or twelve boxes from him. Mrs. Perovitch also testified that the boy Cutts accompanied the defendant. These sweet potatoes, according to the witness Cutts, were the same sweet potatoes that were obtained from C. P. Silva.

In support of count No. 5 the prosecution introduced the testimony of Nick Marosovic, who testified that he sold the defendant a load of apples at Watsonville, for which he received in payment check marked People's Exhibit No. 5. This check is in the following words and figures:

"Bank of Amador County, Jackson, Cal.

"Date 3/28/33.

"Pay to the order of C. A. Menne \$33.50
Thirty-three & 50/100 Dollars, as payment in full for Voss Washer. (Cannot locate account)

"[Signed] J. B. Moore.

"Endorsed: 'C. A. Menne.'"

The witness Cutts testified that he signed the name "J. B. Moore," to the foregoing check at the request of the defendant, at the defendant's home in Stockton. The witness Marosovic, who received the check introduced in evidence as Plaintiff's Exhibit No. 5, testified that the defendant and Cutts came to his place at Watsonville to purchase apples, and purchased about 80 boxes thereof. There is also testimony in the record that the defendant sought to recover this check from Marosovic, but did not succeed in so doing, as the check had already been placed in the possession of the district attorney.

Following these various transactions, the record shows that the defendant took the witness Cutts to Napa valley and sought to obtain employment for Cutts at that place of one Suber, alleging that he wanted to get Cutts away from Stockton, for the reason that Cutts was in trouble with some girl. This was contradicted by Cutts. Failing to obtain employment for the boy in Napa valley, the defendant took Cutts to San Francisco to the Potter Hotel, registering him under a fictitious name. After Cutts had been there about a week the defendant called for him and brought him to Stockton. Upon arriving in Stockton the defendant was arrested. Cutts, who was in the back seat of the automobile covered up with a blanket, was not discovered. The defendant was taken to jail and remained there about eight days, being released upon a writ of habeas corpus. In the meantime the boy Cutts went to Placerville, where he obtained a job. After the defendant's release from jail he went immediately to Placerville, and according to Cutts, told him he had better get out of the state. A witness by the name of De Pety saw the defendant in Placerville at this time. From Placerville the defendant Cutts hitchhiked and rode freight trains to Castle Ford, Idaho, where Cutts found employment and remained there until he was arrested in May, 1934. While Cutts was in Idaho he received letters from the defendant under a fictitious name, and wrote letters to the defendant under the name of "David Hahn," and addressed them to other parties in Stockton, who delivered the letters to the defendant. While Cutts was in Idaho the defendant made three trips

to see him. During the time Cutts was in Idaho he received the following typewritten letter from the defendant. There is testimony in the record that this letter, though unsigned, was written upon a typewriter belonging to the defendant. We quote from the letter the following portion: "See that you don't get in a rumpus with any of those boys, or they will turn you in, you want to be damn careful about that. If you can't do that just slip out and make for the road, here's the latest dope on the road * * * now bear this in mind and let me hear from you at once, as to what you are going to do, if you are going to work say so, if not, get the hell out of there and don't let them damned farmers make a monkey out of you any longer. Answer this at once so that we know what you are going to do, you must make up your mind at once and do it, in the East I know you will be OK, because they will get you started there, at some damn thing and everything will be absolutely safe for everybody, this place has surely gone to hell."

[2, 3] Not questioning that the testimony in the record is as summarized herein, the appellant contends that under the provisions of section 1111 of the Penal Code, it is insufficient to support a conviction. That section specifies that: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

In support of his contention the appellant cites a number of authorities to the effect that the corroborating testimony must do more than raise a grave suspicion of the defendant's guilt, but must tend to connect the defendant with the crime itself, and not simply with the perpetrator thereof; that mere association with the accomplice is not sufficient.

We do not need to review the authorities cited by the appellant, but will follow the rule laid down in *People v. Davis*, 210 Cal. 540, 293 P. 32, that the corroborative testimony must go further than raise a grave suspicion; must show more than the circumstances of the offense, but must also tend to connect the defendant therewith.

The testimony in this case shows the relationship of the parties, the fact that the defendant is well along in years, and that the accomplice Cutts was a boy slightly over the age of 16 years. It also shows the conduct of the defendant preceding the commission of

the offenses; likewise, his conduct after the commission of the offenses.

In the case of the *People v. Shurtleff*, 113 Cal. App. 739, 299 P. 92, 94, where the question of corroborating testimony was being considered by the court, it was held that "the entire conduct of the defendant may be looked to for the corroborating circumstances, and, if from those circumstances the connection of the accused with the crime may fairly be inferred, the corroboration is sufficient." This rule is taken from the case of *People v. Nikolich*, 93 Cal. App. 356, 269 P. 721. This statement of the law is also supported by the following cases: *People v. Yeager*, 194 Cal. 452, 229 P. 40; *People v. Martin*, 102 Cal. 558, 36 P. 952; *People v. Demera*, 64 Cal. App. 121, 220 P. 673. The court in its opinion further says: "We may add that, as we view our duty in this respect, we should give to all the evidence the full weight which the jury might have given to it and should credit to the prosecution all inferences which the reason of the jury might sanction." In the *Shurtleff* Case it appears that the defendant took part of the profit of the transaction, as well as performing other acts. In the instant case, the testimony is that the defendant took the profits; the people to whom he sold produce testifying that they paid therefor to the defendant. As we have heretofore said, at the very beginning of the purchase of the produce the defendant laid the foundation for the transactions, went with the accomplice Cutts introducing him to the different ones from whom he was making purchases, especially stating to Pimentel the character of the houses from whom the checks would be forthcoming. The action of the defendant not only laid the foundation for the subsequent transactions, but was well calculated to create confidence on the part of those having products to sell, and likewise tended to prevent or foreclose any inquiry as to the value or worthlessness of the checks until after the respective deals had been completed. The truck belonging to the defendant was one used by Cutts in obtaining the different loads of produce.

After the Pimentel transaction the truck was painted a different color; likewise, the truck belonging to the defendant bore a false license plate. The produce bought from Pimentel was exactly similar, or the same in kind, as that sold by the defendant himself in Napa county.

While there were no identifying marks on the sweet potatoes bought from Silva, the testimony shows that the defendant had, about

the same time, or shortly thereafter, sold sweet potatoes to the witness Perovitch, at Jackson, Amador county, Cutts testifying that they were the same potatoes. The witness Perovitch made payment to the defendant. The subsequent action of the defendant in taking Cutts out of the state, and his advice to him while he was in Idaho, all tend to show the defendant's participation in the offenses set out in the information. Not merely is it shown that the defendant associated with the accomplice Cutts, but it shows active participation in the handling of the produce so obtained, and also, by his own statement to Pimentel, knowledge of the fictitious character of the checks, and likewise justified the jury in concluding that by the same means defendant was misrepresenting and aiding in the general scheme when stating the houses where the produce was to be sold were "good houses." Also, the testimony shows that the produce, instead of being taken to the alleged "good houses" in Sacramento, or elsewhere, was partly sold in the county of Napa, and partly sold in the county of Amador to private individuals, and not to houses at all.

The circumstances surrounding this case are quite similar to the circumstances as shown in the case of *People v. Eppstein*, 108 Cal. App. 72, 290 P. 1054, 1057, where the wife of the defendant passed the fictitious checks. There, as here, the defendant was not actually present at the time the fictitious checks were manually delivered. In that case, the same as here, other checks were admitted in evidence to show that a system had been agreed upon and was being followed in pursuance thereof. It appeared that in the *Eppstein* Case a man drove an automobile from place to place, and at the different shopping places the wife passed the fictitious checks. The court, in passing upon the testimony in that case, used the following language: "While the jury may have thought it not improbable that appellant was the man with whom Mrs. Eppstein rode about on the afternoon when all or some of the checks described in the information were passed, there is no direct evidence that such was the case. Yet, even if he was not in fact present, it seems to us that the evidence that he 'advised and encouraged' his wife in what she did in passing the checks, though circumstantial, was sufficient to warrant the jury in so concluding." In the instant case, while the defendant is not shown by direct testimony that he actually, by word of mouth, other than the testimony of the accomplice Cutts, aided, abetted, encouraged, or induced Cutts to pass

the fictitious checks, it is shown that the whole plan of purchasing the produce was laid out by the defendant in his taking Cutts from place to place, introducing him to the different produce raisers, representing the good standing of the houses to which the produce would be sold, and that the checks would be made by those houses directly to the seller, followed by taking the produce so purchased and himself selling it to private individuals in other places. The conclusion seems to us unescapable that the defendant not only aided and abetted Cutts in passing fictitious checks, but simply used Cutts as a tool to accomplish his illegal purposes.

[4-6] Appellant also urges that the corpus delicti of the offense was not proven, and that the fictitious character of the checks was not established, in that it was not shown that there were no such persons as those represented to be the signers of the respective checks.

The assistant cashier of the bank upon which the checks were drawn testified that there was no record of any kind in the bank under the name of the drawers of the checks. Such was the testimony of the witnesses Robert Sprech, James J. Burke, and S. C. Paxton. This contention of the appellant is expressly negated by the opinion in the case of *People v. Reed*, 84 Cal. App. 685, 258 P. 463. It is there said (quoting from the syllabus): "In a prosecution under section 476 of the Penal Code for passing a fictitious check, testimony that the name of the person signed to the check was not found in directories of the cities where the bank was located or the check cashed and was not disclosed by the records of the bank was sufficient proof of the corpus delicti to render admissible defendant's admissions that he had drawn the check and passed it by indorsement." It is also further held in the *Reed* Case, that in a prosecution for passing a fictitious check it is not required to prove beyond a reasonable doubt that no person in the world existed under the name signed to the check. All that is required to be shown is the establishment of such fact to a common certainty that there is no such person. The instruction approved in that case to the jury was to the effect that: "It was only necessary to show to a common certainty that there was no such person in existence in the vicinity of the county of Sacramento and the county of Alameda connected with the particular acts charged in the information." The venue was properly laid and proven as being in San Joaquin county where the offenses alleged in the information

were committed. Section 792 of the Penal Code places the jurisdiction against the principal who is not present in the commission of a public offense, in the same county where it would be if he were personally present in the commission thereof. The section of the Code is a conclusive answer to the appellant's contention that the venue was not properly laid.

As to the corpus delicti being established, we may further cite the case of *People v. Cohen*, 113 Cal. App. 260, 298 P. 114, 115, where it is said: "There was evidence that the names appended to the four checks had no accounts in the banks upon which the checks were drawn. This constituted prima facie proof that the names were those of fictitious persons." (Citing a number of authorities.) The facts in the *Cohen* Case are precisely similar to the facts in the instant case, where the record shows testimony to the effect that the names appended to the several checks had no accounts in the banks upon which they were drawn.

[7] Appellant further contends that none of the counts in the information charge any offense known to the law, in that in every count the purport clause was omitted, in that it is not alleged in any of the counts that the names signed to the checks purported to be those of an individual, corporation, bank, co-partnership or firm. In support of this contention appellant relies upon the case of *People v. Eppinger*, 105 Cal. 36, 38 P. 538, 539, in which it was held that a "charge of making and passing a check with the averment that there is no 'corporation' in existence of the name by which the check purports to have been signed does not state an offense, within the provisions of this section [section 476, Pen. Code], unless it is also averred that the name signed to the check purported to be the name of a corporation. If the name signed to the check is as apparently that of a corporation as of a partnership, it is necessary to allege which of the two it purports to be, and that the one so alleged has no existence," etc.

The information in the *Eppinger* Case is readily distinguishable from the one now under consideration. In the *Eppinger* Case the check was signed by "M. Howe & Company," and the information merely alleged that in truth and in fact there was no such individual as "M. Howe & Company" in existence. In the information under consideration, and in all the counts thereof, the checks purported to be the checks of certain produce companies. And it is then alleged that no such persons or individuals or firms or corporations or co-partnerships were in existence. This lan-

guage explicitly and positively negatived every form or organization known to the law authorized to issue checks.

In *People v. Carmona*, 80 Cal. App. 159, 251 P. 315, an information drawn precisely as the one in the instant case was upheld, and a hearing of that case in the Supreme Court was denied on February 3, 1927. Citation of this case is all that is necessary to show that the information upon which the defendant was tried and convicted is both amply and legally sufficient.

[8] We find no reversible error in the conduct of the assistant district attorney during the course of the trial in asking that the wife of the defendant, who was upon the witness stand, be called or considered as a witness for the plaintiff. While such action on the part of the assistant district attorney was improper, and no such request should have been made, the opinion in the case of *People v. Dufur*, 34 Cal. App. 644, 168 P. 590, shows that a similar request, and nothing more, not to be reversible error.

[9, 10] The contention of the appellant that he was entitled to forty challenges is without merit. See *People v. Kelly*, 203 Cal. 128, 263 P. 226. Likewise, the contention of the appellant as to errors of the court in the admission of the testimony of the different officers of the banks upon which the checks were drawn, that they found no accounts in the names of such persons, and that such persons had no accounts in the banks, is also without merit. See the cases already cited of *People v. Carmona*, *supra*, and *People v. Cohen*, *supra*.

[11] There is also testimony in the record to the effect that the license inspector of the city of Sacramento was unable to discover the names of the drawers of the checks, and was also unable to discover the existence of any such persons in the city or county of Sacramento. We find no errors in the ruling of the court in sustaining an objection to an inquiry of Cutts as to how he expected the case to terminate in so far as he was concerned.

[12] It is further contended that the testimony of the defendant in the particulars where it was uncontradicted, should have been accepted by the jury as a truthful statement of the facts, basing the argument upon the case of *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 P. 1039. In making this contention appellant overlooks or disregards the testimony to the effect that the reputation of the defendant was such as to render his state-

ments unworthy of belief. In the face of such testimony it was within the province of the jury to determine what credence should be given to the testimony of the defendant, and whether they should accept as truthful any part of his testimony.

[13, 14] It is finally urged that the court committed prejudicial error in its instructions to the jury. As to the witness Cutts, being an accomplice, the court instructed the jury as follows: "The court instructs the jury that an accomplice is one who, knowing that a crime is being committed, wilfully, feloniously, and with criminal intent, intentionally aids, abets, and assists another in the commission of such crime or criminal act, and whether or not one is an accomplice, as defined in these instructions, is for the jury to determine from all the testimony and circumstances in proof in the case."

There being no conflicting testimony as to the witness Cutts being an accomplice, and that fact standing undisputed in the testimony, the court should have specifically instructed the jury that the witness Cutts was as a matter of law an accomplice. *People v. Ferlin*, 203 Cal. 587, 265 P. 230; *People v. Parkinson*, 81 Cal. App. 618, 254 P. 612. In this case, however, the reversal of the judgment was not based upon the error of the court alone in refusing to instruct that a certain witness was an accomplice. See, also, case of *People v. Coffey*, 161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704, and *People v. Truax*, 30 Cal. App. 471, 158 P. 510.

The failure of the court to instruct the jury specifically that the witness Cutts was an accomplice is not reversible error for the reason that the case was tried upon the admitted fact that Cutts was an accomplice. Such being the case, the error of the court must be considered as not prejudicial. *People v. Knoth*, 111 Cal. App. 250, 195 P. 577; *People v. Ferlin*, supra.

[15] The instruction of the court to the effect that testimony that the drawer of a check did not have any account with the bank upon which the check was drawn was prima facie evidence of the fictitious character of the check, has been repeatedly held a proper instruction. *People v. Cohen*, supra; *People v. Sheridan*, 136 Cal. App. 675, 29 P. (2d) 464; *People v. Carmona*, supra.

Objection is also made that in one of the instructions the court used the disjunctive "or" instead of the conjunctive "and." A reading of the instruction shows that the

court properly instructed the jury as to all the essential elements of the law necessary for their guidance.

The appellant did ask that certain sections of the Code relative to special verdict be read to the jury, but did not submit to the court any questions or request any questions to be submitted to the jury for them to answer.

[16] That count No. 5 was not merged in count No. 1 is supported by the following cases: *People v. Martin*, 114 Cal. App. 392, 300 P. 130; *People v. Keller*, 124 Cal. App. 673, 12 P.(2d) 1036. Other cases might be cited, but these are sufficient.

Finding no reversible error in the record, the order and judgment are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

2 Cal.2d 492

MORRIS v. SOUTH SAN JOAQUIN IRRIGATION DIST. et al.

S. F. 15198.

Supreme Court of California.

Feb. 25, 1935.

Action ⚡69

Mandamus to compel irrigation district to make certain moneys in custody of treasurer of district available for payment of past-due interest and principal coupons of bonds of district would be suspended until final determination by federal court wherein district sought confirmation of plan of adjustment of outstanding bonded indebtedness under Bankruptcy Act (Bankr. Act § 80, 11 US CA § 303).

In Bank.

Mandamus proceeding by Mary E. Morris against the South San Joaquin Irrigation District and others.

Proceeding suspended, order of submission set aside, and matter ordered to remain subject to resubmission.

Clark, Nichols & Eltse, of Berkeley, for petitioner.

Peter tum Suden, of San Francisco, amicus curiæ.

Nutter & Rutherford and D. R. Jacobs, all of Stockton, for respondents.

Joseph Haber, Jr., of San Francisco, amicus curiæ.

W. Coburn Cook, of Turlock, for intervener.

PER CURIAM.

The purpose of this proceeding in mandamus is to compel the respondent district and its officers to make certain moneys in the custody of the treasurer of the district available for the payment of past-due interest and principal coupons of bonds of the district owned by the petitioner. As a return to the alternative writ the respondents filed a verified answer setting forth the fact that there is pending in the United States District Court, in and for the Northern District of California, Northern Division, a proceeding entitled, "In the matter of the petition of South San Joaquin Irrigation District, a taxing district, for confirmation of a plan of adjustment of the outstanding bonded indebtedness," No. 5680. This proceeding was taken pursuant to section 80 of the National Bankruptcy Act (11 USCA § 303). Upon the filing of the petition therein an order was made approving

the petition as properly filed in good faith under the act, providing notice, and fixing a time and place for a hearing thereof. An order was also made making the proposed plan of readjustment temporarily operative. Certified copies of the petition therein and of the several orders so made were filed as a part of the return herein.

The petitioner does not dispute the pendency of the proceeding in the federal court, but challenges the regularity thereof and the sufficiency and validity of the provision of the Bankruptcy Act under which the proceedings were taken. We are not disposed to pass upon the questions so raised, during the pendency of said proceedings. There should therefore be a suspension of the present proceedings pending before this court, until a showing is made herein that the matter now pending in the federal court is terminated. To that end the order of submission herein should be set aside and the matter remain subject to resubmission when such showing is made, or to other appropriate order.

It is so ordered.



2 Cal.2d 446

BRIX v. PEOPLE'S MUT. LIFE INS. CO.

S. F. 15134.

Supreme Court of California.

Feb. 20, 1935.

1. Courts ⚡26

Filing of cross-complaint for cancellation of policy in action on accident policy gave superior court jurisdiction to try issue arising out of cross-complaint and to determine entire controversy, notwithstanding superior court was originally without jurisdiction to try cause of action asserted by original complaint because jurisdictional amount was not involved.

2. Insurance ⚡666

In action on accident policy providing for installment benefits during total disability, insured held entitled to recover only accrued installments (Code Civ. Proc. § 1060; Civ. Code, § 3283).

3. Action ⚡6

In action on accident policy providing for installment benefits during total disability, insured could not recover future installments

which had not accrued by resort to declaratory relief statute (Code Civ. Proc. § 1060; Civ. Code, § 3283).

4. Insurance ☞666

Insurer's default in payment of accrued installments under accident policy does not work breach of entire contract, but affects only rights of parties as to benefits accrued (Civ. Code, § 3283).

5. Insurance ☞666

In action on accident policy providing for installment benefits during total disability, insured could file supplemental complaint covering installments accruing between commencement of action and date of trial.

6. Insurance ☞666

In action on accident policy providing for installment benefits during total disability, insured *held* entitled to recover installments accruing between commencement of action and date of trial, where insured had filed supplemental complaint covering such installments.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Arthur J. Brix against the People's Mutual Life Insurance Company, in which the defendant filed a cross-complaint. From the judgment, the defendant appeals.

Affirmed as modified.

Prior opinion 37 P.(2d) 448.

A. B. Weiler and Niles C. Cunningham, both of San Francisco (Glensor, Clewe, Schofield & Van Dine, of San Francisco, of counsel), for appellant.

F. Eldred Boland, of San Francisco, Newlin & Ashburn, of Los Angeles, and McCutchen, Olney, Mannon & Greene, of San Francisco (William D. Gallagher, Jr., of Los Angeles, of counsel), amici curiæ.

Samuel M. Samter and J. J. Posner, both of San Francisco, for respondent.

Stanley F. Davie, of San Francisco, and Eugene K. Sturgis, of Oakland, amici curiæ.

CURTIS, Justice.

This action was brought to recover on an accident insurance policy issued by the defendant in favor of the plaintiff. The policy provided that in case the insured was accidentally injured and such injury "shall wholly and continuously disable the Insured from performing any and every kind of duty pertaining to his occupation for one day or

more, so long as the Insured lives and suffers total loss of time, the Company will pay a monthly indemnity at the rate of One Hundred (\$100) Dollars." The complaint is in two counts. The first count contains proper and sufficient allegations showing the execution and delivery of the policy of insurance; that while said policy was in full force the plaintiff suffered permanent accidental injuries of the character covered by the policy, specifying the nature of such injuries; and that said injuries had wholly and continuously disabled the insured from performing any and every kind of duty pertaining to his occupation. This count of the complaint continues and alleges the giving of notice of such injury to the insurer and the presentation by the insured to the insurer of proofs of loss as provided by said policy; that the insurer had paid four monthly payments of \$100 each in compliance with the terms of said policy, but had failed and refused to pay any monthly indemnities for any month subsequent to the month of January, 1930, and that since said date no part of said monthly indemnities of \$100 each had been paid. The second count of the complaint in paragraph I thereof by reference makes the allegations contained in the first count a part of the second count and contains one additional paragraph designated as paragraph II, which purports to state a cause of action for declaratory relief under section 1060 of the Code of Civil Procedure. To the complaint and to each count thereof, the defendant filed a general and special demurrer. It also demurred to the first count on the ground that the court had no jurisdiction of the subject-matter thereof. The demurrers were overruled, and the defendant answered. The trial resulted in a judgment in favor of the plaintiff in the sum of \$1,300 and interest. The court also further adjudged: "That plaintiff have and recover from the defendant the sum of one hundred (\$100) per month commencing with the month of March, 1931 (the trial was had on March 23, 1931), during the rest and remainder of plaintiff's natural life." From the judgment the defendant has perfected the present appeal.

It is first contended by appellant that the court had no jurisdiction of either of the causes of action as set forth in plaintiff's complaint. This contention we think must be sustained. However, it appears that defendant in addition to its answer, in which it denied all liability under said policy of insurance, also filed a cross-complaint. The matters pleaded in said cross-complaint were such as only a court of equity then had jurisdic-

tion of, and could be litigated only in the superior court. In 1933, the municipal courts were given jurisdiction to cancel written instruments under certain limited conditions. Stats. 1933, p. 1811. The judgment in this action was rendered on September 17, 1931. This action, therefore, was, of course, not affected by the subsequent legislation of 1933. The question is therefore presented as to whether the filing of said cross-complaint by the defendant gave the court jurisdiction over the subject-matter of the controversy between the plaintiff and defendant. In our former opinion in this court we overlooked this question, and it was for the purpose of giving consideration to this matter that the petition of plaintiff for a rehearing was granted.

[1] In the case of Cloverdale Union H. S. Dist. v. Peters, 88 Cal. App. 731, 736, 264 P. 273, 276, the court quotes with approval the following statement of the law upon this subject by the Supreme Court of the United States: "By setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it. * * * Merchants Heat & L. Co. v. James B. Clow & Sons, 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488. To the same effect are: *Cogins v. Superior Court*, 127 Cal. App. 412, 16 P.(2d) 148; *Fair View Farms Co. v. Superior Court*, 123 Cal. App. 9, 10 P.(2d) 1011; *Ingalls v. Superior Court*, 121 Cal. App. 453, 9 P.(2d) 266, and *Freligh v. McGrew*, 95 Cal. App. 251, 272 P. 791, 794. In the last-cited case the court states the rule as follows: "Suits for judicial rescission and cancellation of contracts are essentially equitable actions of which the municipal court has no jurisdiction." The rule governing this case is, in our opinion, succinctly stated as follows: "Nevertheless, the trial court had jurisdiction to adjudicate all matters in controversy between the appellant and the appellee for the reason that the appellant prayed that his answer to appellee's complaint be taken as a cross-bill against the appellee and asked that the deed from Moody to appellee be canceled and that he have damages for the breach of the lease contract between himself and Moody. This gave the court jurisdiction over the subject-matter of the controversy between the appellant and the appellee, and, having acquired jurisdiction for any purpose, the trial court correctly exercised it for the purpose of settling the rights of the parties to the action." *Du Fresne v. Paul*, 144 Ark. 87, 221 S. W. 485, 487. It is not necessary to cite further authorities, as the above are sufficient to establish the contention of the plaintiff that

the defendant by the filing of its cross-complaint in which it sought to have the court decree a cancellation of the policy of insurance, thereby invoked the jurisdiction of the superior court, not only to try the issue arising out of said cross-complaint, but to determine the entire controversy between the parties to the litigation.

[2-4] The appellant makes a further attack upon the judgment, in which a number of amici curiæ join, and contends that that part of said judgment is erroneous in which the court adjudged that plaintiff might recover the sum of \$100 per month from the date of the trial during the rest and residue of his natural life. Respondent seeks to sustain this continuing judgment under the second count of his complaint in which he sought not only for affirmative or consequential recovery, but for declaratory relief under the provisions of section 1060 of the Code of Civil Procedure. This was evidently the opinion of the trial court in rendering the judgment not only for the monthly payments which had accrued under the policy of insurance at the date of the trial, but thereafter during the life of the respondent. That judgments for future payments under installment contracts, even without allegations for declaratory relief, have been upheld in certain jurisdictions, is apparent from a reading of the reported decisions of certain states, and particularly those from the state of Kentucky. *Equitable Life Assur. Society v. Branham*, 250 Ky. 472, 63 S.W.(2d) 498; *Prudential Ins. Co. v. Hampton*, 252 Ky. 145, 65 S.W.(2d) 980. The first of these two decisions was rendered without the citation of any supporting authority, but upon precedents afforded in cases of alimony and compensation under Workmen's Compensation Acts. The second of these cases was decided upon the sole authority of the first. We are not inclined to accept these decisions as decisive of the question involved herein. It seems that a clear distinction may be made between an action upon an insurance policy, or other contract payable in installments, and a claim for alimony or for compensation under the Workmen's Compensation Acts. The former are strictly actions on the contract, while the latter are predicated upon statutory enactments expressly empowering the court in one instance and the Industrial Accident Commission in the other instance to adjudicate future payments. Plaintiff also relies upon the case of *Fleming v. Peterson*, 167 Ill. 463, 47 N. E. 755, which at first blush would seem to support the trial court in the entry of the judgment herein. However, a closer study of that case shows that it was a suit

in equity brought to enforce specific performance of a contract entered into by the parties therein. The plaintiff in said action had secured a divorce from the defendant and in the judgment in said action the defendant was required to pay her the sum of \$125 per month. Subsequently the parties to said suit substituted for said judgment a contract whereby the defendant agreed to pay plaintiff the sum of \$125 per month, payable quarterly, and plaintiff satisfied the judgment for alimony. The case was further involved by certain other provisions of said contract. The defendant made payments under the contract up to a definite date, and thereafter refused to comply further with its terms. Plaintiff then brought a suit in equity to enforce specific performance, which resulted in a decree of the court in her favor. This decree was affirmed on appeal. It is quite evident that that proceeding is so different from the instant case as to render it but slight if any authority supporting the judgment now under review. It is not necessary for us to distinguish the other cases cited by defendant. They are either, in our opinion, decided upon an erroneous principle of law, or they are based upon statements of fact so different from those involved in the present action as to render them of slight if any aid in the decision of any question now before us. This statement is applicable to two California cases cited by plaintiff: *Newman v. Burwell*, 216 Cal. 608, 15 P.(2d) 511, and *In re Estate of Caldwell*, 129 Cal. App. 613, 19 P.(2d) 9. The first of these actions was brought by the divorced wife of a decedent against the executor of the will of said decedent to establish a claim against said estate and to have impounded funds of the estate sufficient to pay and discharge said claim. The claim was based upon a decree of divorce whereby the wife was awarded the custody of the minor child and the husband was directed to pay to the wife \$50 per month until the further order of the court. The claim was for the maximum amount necessary to pay and discharge the monthly installments accruing since the decedent's death and which would thereafter accrue until such time as the child should reach her majority. A demurrer to the complaint setting forth the foregoing facts was sustained by the trial court, but this court reversed the judgment. No useful purpose is to be gained by a lengthy consideration of the differences between the facts in that case and those in the present action. We think it is apparent that the two cases differ so materially that the cited case is in no way parallel with the instant action and cannot be accepted as an authority in support of the judg-

ment in the present action. The facts in the case of *In re Caldwell's Estate*, supra, were in all material respects like those in the case of *Newman v. Burwell*, supra. That case was decided on the authority of *Newman v. Burwell*, supra, upon the only point raised on appeal and that was that the claim for the support of the minor child of the deceased did not abate with his death. We reiterate our former statement that these cases cited by plaintiff are not of material aid in the solution of the problem now before us.

The authority most nearly in point to which our attention has been directed is the case of *Green v. Inter-Ocean Casualty Co.*, decided by the Supreme Court of North Carolina and reported in 203 N. C. 767, 167 S. E. 38, 42. That was an action brought to recover installments which had already accrued on an insurance policy. Plaintiff claimed permanent disability and sued for unpaid installments and for declaratory relief. The jury found plaintiff to be permanently disabled, and the trial court granted judgment for the accrued installments, and in addition for monthly indemnity (as provided in the policy) so long as the plaintiff shall live. The Supreme Court modified the judgment by striking out the last provision of the judgment relating to unaccrued indemnity payments. In doing so the court used the following pertinent language: "The plaintiff mistakes the purpose of the Declaratory Judgment Act * * * in assuming that a judgment, in an ordinary controversy like the present one, comes within the provisions of said act. It is quite obvious from the complaint that this is an action to recover under an insurance policy, that the alleged cause of action had already accrued."

Nor do we think that plaintiff's claim, that he is entitled to a continuing judgment for unaccrued installments during the balance of his life, is supported by section 3283 of the Civil Code, which provides that: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." This section, in our opinion, simply refers to damages that may accrue in the future as the proximate result of the tort or breach of contract upon which the action is based. In the present action the breach of the contract was the failure of the defendant to pay the accrued installments. This default in the payment of these accrued installments did not work a breach of the entire contract, "the contract still subsists as to future benefits, and the default only affects the rights of the parties as to the benefit accrued. It is ob-

vious that it does not work a breach as to the future benefits, since, as to such, the liability of the defendant has not become fixed, but remains contingent upon the condition of the plaintiff being such as to entitle him to demand them." *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 3, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93.

The books are filled with cases in which actions have been brought to recover upon insurance policies similar to the one here involved in which the insured has attempted to recover judgment not only for accrued payments, but has also sought an adjudication as to installments not yet due. While the decisions upon the right of the plaintiff in such character of actions to recover for installments which have not yet accrued are not entirely uniform, the great weight of authority is to the effect that, in such actions, recovery cannot be had for any installments falling due in the future. We cite only a few of such cases: *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; *Atkinson v. Railroad Employees Mutual Relief Society*, 160 Tenn. 158, 22 S.W.(2d) 631; *New York Life Insurance Co. v. English*, 96 Tex. 268, 72 S. W. 58; *Bonslett v. New York Life Ins. Co.* (Mo. Sup.) 190 S. W. 870; *Commercial Casualty Ins. Co. v. Campfield*, 243 Ill. App. 453; *Metropolitan Life Insurance Co. v. Day*, 145 Ga. 425, 89 S. E. 576; *Mid-Continent Life Ins. Co. v. Christian*, 164 Okl. 161, 23 P.(2d) 672; *Metropolitan Life Ins. Co. v. Lambert*, 157 Miss. 759, 128 So. 750; *State Life Ins. Co. v. Atkins* (Tex. Civ. App.) 9 S.W. (2d) 290; *Green v. Inter-Ocean Casualty Co.*, 203 N. C. 767, 167 S. E. 38, *supra*; *Garbush v. Order of United Commercial Travelers*, 178 Minn. 535, 228 N. W. 148; *Howard v. Benefit Ass'n of Railway Employees*, 239 Ky. 465, 39 S.W.(2d) 657, 81 A. L. R. 375; *Washington County v. Williams*, 111 F. 801 (C. A. 8th). In *Atkinson v. Railroad Employees Mutual Relief Society*, *supra*, 22 S.W.(2d) 631, 634, the court declared the law as follows: "While the benefit certificate issued to complainant constitutes an entire contract, the obligation thereby cast upon the society is severable, with a right of action accruing to the holder for each benefit installment payable and in default. [Citing authorities.] So it is generally held that, in an action at law for breach of a contract of insurance, payable in weekly or periodic installments, only those installments in default at the time suit was brought may be recovered." (Citing authorities.)

In *Mid-Continent Life Ins. Co. v. Christian*, *supra*, 23 P.(2d) 672, 675, the court stated

the rule in the following language: "Under the authorities just cited, plaintiff would be entitled to recover in his cause of action for all benefits that had accrued under the insurance contract at the time of filing his suit. And could amend his petition to include such installments due up to the date of the amendment. But plaintiff could not recover for installments that were not due. The court could not determine how long said installments would continue to become due, because said matter is dependent upon the conditions of health of plaintiff and the date of his death."

Our own court, in construing a by-law of a fraternal organization providing for weekly benefits to any member who from sickness or accident became unable to earn a livelihood, stated the applicable rule as follows: "The right of plaintiff to this payment for any one week accrues at the end of that week, and he is entitled to sue immediately upon default in its payment. Such default, however, does not breach the entire contract; the contract still subsists as to future benefits, and the default only affects the rights of the parties as to the benefit accrued. It is obvious that it does not work a breach as to the future benefits, since, as to such, the liability of the defendant has not become fixed, but remains contingent upon the condition of the plaintiff being such as to entitle him to demand them. * * * But the breach being separable, as we have seen, and not entire, plaintiff is only entitled to recover those benefits accrued at the commencement of the action." *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 3, 4, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93, *supra*.

Practically the same question has been before the courts of the state in cases involving leases where the rent was made payable in periodical installments, such as monthly or quarterly. It has invariably been held that the breach or repudiation of the lease by the lessee does not operate at once to mature all the rent reserved in the lease and to enable the lessor to recover not only the installments already accrued, but those to accrue in the future. *Bradbury v. Higginson*, 162 Cal. 602, 604, 123 P. 797; *Oliver v. Loyden*, 163 Cal. 124, 126, 124 P. 731; *Jacoby v. Peck*, 23 Cal. App. 363, 138 P. 104. The same ruling was made where recovery was sought on a promissory note payable in installments. *Crossmore v. Page*, 73 Cal. 213, 14 P. 787, 2 Am. St. Rep. 789. We are satisfied that the foregoing authorities state the correct principle of law which should govern the decision of the instant case. They hold most convincingly that

in the action here pending the plaintiff is entitled to recover on said policy of insurance only accrued indemnity installments, and that this right of plaintiff may not be extended to recover installments which have not accrued by resort to the declaratory relief statute of this state.

[5, 6] The final contention of appellant is that the trial court erred in awarding plaintiff judgment in excess of \$400, being the amount of the installments which had accrued at the commencement of this action. At the time the action was instituted only \$400 was due plaintiff on said policy of insurance, but, at the conclusion of the trial, thirteen installments of \$100 each had accrued under the policy, and judgment was rendered for the total sum of these thirteen installments, or for \$1,300 and interest. It is stated by plaintiff that he made application for leave to file a supplemental complaint to conform to the evidence which showed that thirteen installments were then due. This application was resisted by the defendant, and, while the matter was argued, the court made no ruling upon said application. The defendant makes no denial of this statement. It appears, therefore, that plaintiff did all in his power to perfect his pleadings so that they would include a recovery for all installments which had accrued under the policy at the date of the trial. Under these conditions we think that no injustice will be done by permitting plaintiff to file such supplemental complaint as of the date of said trial (*French v. McCarthy*, 125 Cal. 508, 512, 58 P. 154; *Alameda County v. Crocker*, 125 Cal. 101, 57 P. 766), and the privilege is hereby given to plaintiff to file such supplemental complaint. Plaintiff having asked leave to file a supplemental complaint covering the installments accruing between the commencement of the action and the date of trial, and as we have held that under the authorities cited, such supplemental complaint may be filed nunc pro tunc as of the date of trial, the case should therefore be considered as if said supplemental complaint had actually been filed. This brings us to the question as to whether in this action with a supplemental complaint filed covering installments accruing up to the date of the judgment, the court may render judgment which will include the installments accruing between the commencement of the action and the date of the trial. There is language in the case of *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93, supra, which would indicate that the recovery upon a policy of insurance is limited to the installments which had accrued at the commencement of the action.

In other cases cited above, and from which quotations are made, is to be found similar language, but in none of these cases does the record show that a supplemental complaint was filed, or that any attempt was made to file such a pleading. On the other hand, the case of *Mid-Continent Life Ins. Co. v. Christian*, supra, contains the express statement that in an action for the recovery of the amount due on a policy of insurance, payable in installments, the plaintiff is entitled to recover all benefits that had accrued at the time of filing suit, "and could amend his petition to include such installments due up to the date of the amendment." This statement seems reasonable, and the principle of law enunciated therein appears sound. No good reason is offered why the plaintiff in such an action should not be permitted to litigate his claim to all installments which had accrued up to the date of trial, when defendant's liability for the payment of such installments has been made an issue by proper pleadings. The parties are all before the court. The issues have been presented by the pleadings, and if under the evidence, as was the case in the present action, the plaintiff has proven his right to recover for all installments accruing up to the date of the trial, we see no reason why he should not be permitted to do so. To deny him this right would be simply to send him out of court one day and compel him to return the next day to litigate the same matter that was before the court on the first day. Such a construction of the law is not in harmony with the spirit of our modern procedure which endeavors to simplify court proceedings and particularly to provide for the settlement in a single action of all controversies of the parties growing out of the same subject-matter. We are therefore of the opinion that the judgment, in so far as it adjudicates the right of the plaintiff to recover for all installments accruing on the policy of insurance up to the date of the trial, should be sustained.

It is therefore ordered that the judgment in the above-entitled action be modified by striking therefrom the following: "It is further ordered, adjudged and decreed that plaintiff have and recover from defendant the sum of one hundred (\$100) dollars per month, commencing with the month of March, 1931, during the rest and remainder of plaintiff's natural life."

The judgment as modified is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; THOMPSON, J.

2 Cal.2d 432

GRAMER v. CITY OF SACRAMENTO et al.
(HARRIS, Intervener).

Sac. 4732.

Supreme Court of California.

Feb. 19, 1935.

Rehearing Denied March 21, 1935.

1. Deeds ⇨155

At civil law where doubt arises, whether deed transferred land on condition subsequent depends upon grantor's intention as expressed in deed.

2. Deeds ⇨155

Language in deed, to be construed as "condition subsequent," must be so clear as to indicate without doubt that grantor intended to create estate upon condition subsequent, and court will not find such estate if language will bear any other reasonable construction, since "conditions subsequent," which operate upon an estate conveyed and render it liable to be defeated, are not favored in law.

3. Municipal corporations ⇨663(1)

Ordinarily, person who lays out and sells lots in a subdivision intends to part with title to lots to the center of the streets.

4. Deeds ⇨101

Where meaning of language in instrument is doubtful, court will look to practical construction placed upon instrument by parties.

5. Deeds ⇨155

Deed from grantor, engaged in subdividing and selling lots, which conveyed title to alleys and streets to present and future lot owners in subdivision to be kept for public use under such conditions as future authorities of city might determine held not to create estate on "condition subsequent" so as to give grantor's heirs right to reconveyance of streets and alleys after city abandoned use of streets.

[Ed. Note.—For other definitions of "Condition Subsequent," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Sacramento County; W. A. Anderson, Judge.

Action by S. E. Gramer, administratrix of the estate of John A. Sutter, Jr., against the City of Sacramento and others, in which Helen Van Gulpen Harris, administratrix of the estate of John A. Sutter, also known as General John A. Sutter, intervened. From a judgment in favor of defendants, plaintiff and intervener appeal.

Affirmed.

Chauncey Tramutolo and Lemuel D. Sanderson, both of San Francisco, Elliott, Atkinson & Sitton, of Sacramento, and Orrin Kipp McMurray, of Berkeley, for appellant S. E. Gramer.

Helen Van Gulpen Harris, of Oakland (Eloise B. Cushing, of Oakland, of counsel), for intervener.

Hugh B. Bradford, City Atty., and Robert L. Shinn, both of Sacramento, for respondents.

Devlin & Devlin & Diepenbrock, of Sacramento, amici curiae.

THOMPSON, Justice.

We are concerned in this case with an appeal by the plaintiff as well as one by the intervener from a judgment rendered after trial in favor of the defendants. The action was commenced to compel the city of Sacramento to execute a reconveyance of certain parcels of land to the plaintiff for the benefit of the heirs of John A. Sutter, Jr., and the complaint in intervention claimed the land for the heirs of John A. Sutter, Sr. The contest arises out of the following facts:

By an ordinance of the city of Sacramento passed January 31, 1924, the city abandoned Seventeenth street between B and C streets and the alleys in the block bounded by B, C, Sixteenth, and Seventeenth streets. This property is the subject of the action. The source of title goes back to John A. Sutter, Sr., who acquired the land upon which Sacramento is situated from the Mexican government. On October 14, 1848, John A. Sutter conveyed the property to his son John A. Sutter, Jr., who laid out the city with lots, squares, streets, and alleys; the survey and map thereof having been made by Captain William H. Warner. Sales of lots by reference to the map were made, and by January 2, 1849, there were nine or more lot owners to whom conveyances had been made. On that date Sutter, Jr., executed a quitclaim deed which in its material parts reads as follows:

"Know All Men By These Presents: That I, John A. Sutter Jr. of Sacramento City in the Territory of California have this day conveyed and quit claimed and by these presents do convey and quit clame unto the present & futerer owners of Town lots and town property in Sacramento City in the territory of California all my right title & Interest in and to certain portions of said City discribed as follows and under the conditions following, That is to say all the streets & Alleys in said City except so much of L and Twenty-seventh

streets and of all alleys runs into or threw any part of Sutters Fort, said portions of said streets & Alleys being reserved to myself said streets & alleys hereby conveyed to be kept for Public use under such conditions & regulations as the future authorities of said City may determine & in that said City shall be incorporated & City authorities established Front Street shall be subject to the exclusive use of the owners of lots fronting on said front Street in such manner that the owners of each lot or part of a lot fronting on said street shall have the exclusive use of all the ground lying immediately opposite his lot or part of a lot, and between such lot or part of lot & the river but all the cross streets such for instance as L, M, and others shall remain at all times open for Public use and also the entire following squares in said City, to wit [Here follows designation of certain squares.]

"The said several squares are hereby conveyed unto the present & future proprietors of town property in said City for the public use of the inhabitants of said City to be applied to such public purposes as the future incorporated authorities of said City from time to time declare and determine. To have & to hold the aforesaid premises unto the present & future owners of town property in said City the heirs & assigns forever upon this express condition that I reserve to myself my heirs & assigns all ferry Privileges that I now have or may hereafter acquire on & upon any or all of the aforesaid premises.

"In testimony whereof I have hereunto set my name and affix my seal the 2nd day of January in the year of our Lord eighteen hundred and fourth nine.

"Signed sealed & delivered in Presence of
"John A. Sutter Jr [Seal.]"

In general it is the contention of appellant that the deed conveyed the property to the city upon an express condition that it should be used exclusively for street and public purposes, and that by reason of the abandonment there has been a reversion of the title to her; or if the deed is to be treated as a dedication the abandonment has left the title in the grantor, his heirs, and representatives. The position of the intervener is substantially the same, except that she claims as the result of deeds between John A. Sutter and his son that the reversion is to the heirs of John A. Sutter, Sr. At the time the deed was executed the city of Sacramento was not incorporated; that legal formality not occurring until February 27, 1850. After its incorporation, however, the deed was accepted and the streets

therein designated have been used as public thoroughfares down to the present time, except those which the evidence discloses to have been abandoned. A series of thirteen ordinances abandoning streets were introduced in evidence, the first having been adopted December 1, 1862, and the last on February 10, 1921. Evidence was introduced by the defendant municipality concerning the use of the vacated areas, from which it appears that the abandoned streets have been put to a variety of uses, such as residential, industrial, railroad, schools and capitol building, apparently, as counsel says in his brief "upon the assumption, throughout the more than sixty-five years during which those vacations have taken place, that the owners of the property abutting on the vacated streets and alleys were also the owners of the fee to the middle of such streets and alleys and that as the owners they were entitled to take over possession and use as their own the vacated areas. * * *

The particular deed of January 2, 1849, has been before this court, with respect to the question of whether it sufficiently designated a grantee or grantees, and also with reference to the construction of that portion which grants the squares for public purposes. The first case is that of *Mayo v. Wood*, 50 Cal. 171, and wherein Mesick, as a grantee of Sutter, claimed title to certain of the squares designated in the deed, and we find on page 175 language material to the disposition of the present controversy. We there read: "The instrument executed by John A. Sutter, Jr., on the 2d day of January, 1849, dedicated the land in controversy to public use, to be applied 'to such public purposes as the future incorporated authorities of said city (may) from time to time declare and determine.' It purported in terms to convey whatever title he had, to 'the present and future owners of town lots and town property in Sacramento City.' It recognized the fact that there were such 'present' owners, and that Sacramento was then known as a city, though not at that time formally incorporated as such. Aside from the question of dedication, the instrument was operative as a conveyance to vest the title in the then 'present' owners of the town lots and property. This was a sufficient designation of the grantees to uphold it as a conveyance, and thereafter Sutter, Jr., had no title to this property which could pass by his deed to Mesick." (Italics ours.) The second case involved the right of the city of Sacramento to use one of the squares mentioned in the latter half of the deed, for the erec-

tion and maintenance of a municipal auditorium. It was determined in this latter case (*Futterer v. City of Sacramento*, 196 Cal. 248, 237 P. 48, 50) that the public purposes to which the property (squares) "was to be applied were to be broadly and not narrowly defined, since they were to be such as lay, not so much within the present conception or intent of the grantor, or even of his immediate grantees, but were to be such as 'the future incorporated authorities of said city from time to time declare and determine.'"

[1, 2] We are not inclined to follow counsel through their very interesting and learned distinctions between the civil and the common law with respect to remedies and rights upon breach of a condition subsequent. The trial court found and we are in accord with the finding that there was no condition subsequent. We think, however, we might call attention to the fact that the civil law did not control all negotiations at a time subsequent to the treaty of Guadalupe-Hidalgo and prior to the adoption of the first California Constitution. For a succinct résumé of the situation reference may be had to two statements in the first volume of the California Reports (original and 1906 Editions); the one (preface V to VIII) being a brief account of the condition of things by Hon. Nathl. Bennett, one of the first justices of this court, and the other the report of the committee on the judiciary to the state Senate, dated February 27, 1850, and entitled "Report on Civil and Common Law" (pp. 588 to 604). Regardless of that fact, however, the solution of this case depends upon the intention of the grantor. At the civil law, in case a doubt arises, the intention is the controlling factor (*Blain v. Staab*, 10 N. M. 743, 65 P. 177; *Schmidt's Civil Law of Spain and Mexico*, tit. II, p. 99, art. 440), while under our law "conditions subsequent are those which in terms operate upon an estate conveyed and render it liable to be defeated for breach of the conditions. Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted, if the language of the provision will bear any other reasonable construction. * * * There must be language used which is so clear as to leave no doubt but that the grantor intended that an estate upon condition subsequent should be created—language which *ex proprio vigore* imports such a condition." *Hawley v. Kafitz*, 148 Cal. 393-395, 83 P. 248, 249, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282. See also, *Cullen v. Sprigg*, 83 Cal. 56, 64, 23 P. 222;

Behlow v. Southern Pacific R. R. Co., 130 Cal. 16, 19, 62 P. 295; *Hasman v. Elk Grove Union High School*, 76 Cal. App. 629, 245 P. 464.

[3] There are many reasons which compel the conclusion in the present case that no condition subsequent was intended. In the first place, Sutter, Jr., was engaged in a real estate undertaking; that of subdividing and selling the lots upon which he hoped that the future city of Sacramento would thrive and expand. The growth of the city and the attending sales of lots inured to his benefit. We may assume that he was justly concerned with the profit to be realized therefrom and was desirous of attracting purchasers of lots in the subdivided property. A notion that he was to continue to own the fee of the streets would most certainly have operated to defeat his purpose, and we are not inclined to attribute any such short-sighted vision to him. In this connection we may observe that ordinarily one who lays out and sells lots in a subdivision intends to part with title to the center of the streets. *Moody v. Palmer*, 50 Cal. 31; *Fraser v. Ott*, 95 Cal. 661, 30 P. 793; *Merchant v. Grant*, 26 Cal. App. 485-489, 147 P. 484; *Anderson v. Cit. Sav., etc., Co.*, 185 Cal. 386, 197 P. 113; *Brown v. Bachelder*, 214 Cal. 753, 7 P.(2d) 1027, 1028. In the last-cited case it is said: "The owner and dedicator of the street in the instant case contemplated that it should be reserved to public use. In the event of an abandonment or failure to accept a dedication, a strip of land the width of a street can be of little use to the dedicator who has parted with title to all lands on both sides of the street, as was done by the original dedicator in the instant case, and it will not in such circumstances be presumed that he intended to retain the fee as a remnant of his private estate."

In the second place, we must notice the manner in which the grantor used the word "condition." In the habendum clause of the deed he says: "To have & to hold the aforesaid premises unto the present & future owners of town property in said city the heirs and assigns forever upon their express condition that I reserve to myself my heirs and assigns all ferry Privileges that I now have or may hereafter acquire on and upon any or all of the aforesaid premises." It cannot be seriously contended that the reservation here sought to be expressed was such by virtue of the use of the word "condition" as to create a condition subsequent. But when we refer back to the earlier use of the same word, which it is argued does create the condition,

we find that it is also immediately followed by an exception or a reservation of so much of the streets or alleys as ran into or through any part of Sutter's Fort. We have every reason for believing that the word was employed in the same sense as when subsequently used.

In the third place, bearing in mind the unsettled state of affairs at the time; that the Sutters, father and son and their associates, were pioneering in a new country; that uncertainties prevailed with respect to the law which would govern their subdivision activities; and that there was no incorporated city to be named as the grantee of an easement or servitude or to accept the streets laid out by map, is not the intention apparent to convey the title to the present and future owners of lots, subject, however, to the right of the city to use them as streets and alleys? Assuming, under the stated conditions, the necessity or advisability of a conveyance to accomplish the purpose just suggested, is it not manifest that the one executed fulfilled its purpose? We observe that the deed committed the discretion not to existing city authorities, but "under such conditions & regulations as the future authorities of said City may determine."

In the fourth place, the deed contains no words of forfeiture or reverter. It would have been a simple thing had the grantor contemplated such a possibility for him to have inserted appropriate language making provision for a forfeiture. The conclusion is almost irresistible that he had no such thought. We find in *Board of Com'rs v. Young* (C. C. A.) 59 F. 96, 105, a pertinent statement, as follows: "Too little weight has been given to the fact that the deed was upon a valuable consideration; to the fact that it was a quitclaim of all right, title, and interest; to the fact of a previous common-law dedication; and to the failure, under such circumstances, to make the title subject to an express right of re-entry."

[4, 5] In the fifth place, the construction placed upon the instrument by the city authorities and by the property owners of Sacramento, and acquiesced in by the Sutters and their heirs from 1862 down to the time of the filing of the present action, is conclusive, at least when considered with the factors al-

ready mentioned, of the question of what interpretation must be placed upon the deed. For a period of sixty years all parties concerned had proceeded upon the theory that the grantor had completely divested himself of title. It is a familiar rule, unbroken in this state, that if the meaning of the language of an instrument is doubtful the court will look to the practical construction placed upon it by the parties. *Mulford v. Le Franc*, 28 Cal. 88-110; *Kales v. Houghton*, 190 Cal. 294-300, 212 P. 21, and cases cited.

Finally, the language of *Van Ness v. City of Washington*, 4 Pet. (29 U. S.) 232, 281, 7 L. Ed. 842, is so apt and so pertinent that we simply quote: "And in construing this agreement, this fact should never be lost sight of. It is obvious, that the proprietors or their heirs could not be presumed for any great length of time to have any interest in the streets or public reservations beyond that of other inhabitants. If the city became populous, the lots would be sold and built upon, and in the lapse of one or two generations, at most, the title of the original proprietors might well be presumed to be extinguished by sales or otherwise; so that the interest of themselves or their heirs in the streets and reservations would not be distinguishable from that of other citizens. They must also have contemplated that a municipal corporation must soon be created to manage the concerns, and police, and public interests of the city; and that such a corporation would and ought to possess the ordinary powers for municipal purposes, which are usually confided to such corporate bodies. Among these are certainly the authority to widen or alter streets, and to manage, and in many instances to dispose of public property, or vary its appropriation. They might, and indeed must, also have placed a just confidence in the government, that in founding the city, it would do no act which would obstruct its prosperity, or interfere with its great fundamental objects or interests."

It is manifest from the discussion that appellants cannot complain of the judgment. It is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

2 Cal.2d 384

NEW YORK CENT. R. CO. v. FRANK H.
BUCK CO. (two cases).
S. F. 14432.

Supreme Court of California.
Jan. 31, 1935.

1. Commerce ⇨8(12)
Courts ⇨97(5)

Rights and liabilities of parties to actions involving interstate shipments are governed by federal statutes as interpreted by federal tribunals.

2. Carriers ⇨194

Interstate carrier and shipper may contract for prepayment of freight charges or payment when goods reach destination, payment by shipper in any event or if consignee does not pay or for payment by consignee only or by both shipper and consignee (Interstate Commerce Act [49 USCA § 1 et seq.]).

3. Carriers ⇨194

Mere delivery of goods to carrier for transportation does not necessarily import absolute promise by shipper to pay freight charges.

4. Carriers ⇨194

To ascertain contract between shipper and carrier as to payment of freight charges, bill of lading, which is both receipt and contract, must be looked to primarily.

5. Carriers ⇨194

Ordinarily, person from whom carrier receives goods for shipment is primarily obligated to pay freight charges; shipper being presumably consignor and transportation ordered presumably on his own behalf.

6. Carriers ⇨194

Inference of shipper's promise to pay freight charges may be rebutted by showing that shipper did not act for himself in ordering transportation, that carrier knew such fact, and that parties intended, not only that consignee should pay, but that shipper should assume no liability or only secondary liability.

7. Carriers ⇨195

Railroad company's extension of time for payment of freight charges by company to which cars were delivered on shipper's instruction held not violation of clause in bill of lading, prohibiting delivery until all charges were paid, in view of authority granted carrier by Interstate Commerce Commission to extend time (Interstate Commerce Act [49 USCA § 1 et seq.]).

8. Carriers ⇨83

Shipper's direction after arrival of cars at destination to deliver contents to certain

company without production of bill of lading was exercise of ownership necessarily implying acceptance thereof as consignee.

9. Carriers ⇨194

Receipt of shipment by consignee creates legal obligation to pay freight, whether demanded at time of delivery or later.

10. Carriers ⇨194

Mere direction by consignor or consignee, liable for freight, that shipment be carried or diverted "freight collect" or delivered on payment of freight charges, does not relieve him of liability.

11. Carriers ⇨32(2)

Parties to contract for interstate shipment by rail cannot waive its terms, nor can carrier, by contract, give shipper right to ignore them and hold carrier to different responsibility than that fixed by agreement made under published tariffs and regulations.

12. Carriers ⇨194

Unqualified promises of company, shipping freight as owner's agent, to pay freight charges as consignor, consignee, or both, made it legally liable for freight.

13. Carriers ⇨194

No act or omission of carrier, except allowing statute of limitations to run, estops or precludes it from enforcing shipper's obligation as consignor, consignee, or both to pay freight.

14. Carriers ⇨194

Liability of person, to whom shipment is delivered on consignee's order, to pay freight, does not relieve consignor or original consignee from liability therefor.

15. Carriers ⇨194

Carrier's receipt of consignee's note for freight charges or filing of claim against his bankrupt estate does not relieve others liable therefor.

16. Carriers ⇨194

Carrier's failure to notify consignor or consignee, liable for freight, of nonpayment thereof by one to whom shipment was delivered on consignee's order, does not release consignor or original consignee from liability therefor.

17. Customs and usages ⇨17

Usage or custom may limit shipper's and carrier's liability, but cannot be relied on if in conflict with terms of contract.

18. Bankruptcy ⇨363

Carriers ⇨196

Customs and usages ⇨17

Neither custom of marketing grapes through agent, shipping them under bills of lading obligating it to pay freight, either as

consignor or consignee, carrier's filing of claim against bankrupt estate of company, to which it delivered freight on shipper's instructions, nor its failure to notify shipper of nonpayment, constituted defense to its action against shipper for freight charges.

19. Carriers ⇨194

Shipper signing straight bill of lading, naming it as both consignor and consignee, and expressly obligating consignee to pay freight charges, became obligated therefor on default of company to which cars were delivered on shipper's instructions.

20. Carriers ⇨36

Carrier's continued delivery of shipments to company for which they were intended under 24-hour credit arrangement, notwithstanding company's failure to pay freight charges on prior deliveries, held not a violation of Interstate Commerce Commission's order allowing 96-hour extension of credit so as to give shipper contracting to pay freight charges action for damages against carrier (Interstate Commerce Act § 3, subd. 2, 49 USCA § 3, subd. 2).

21. Appeal and error ⇨1082(2)

Where pleadings did not tender issue of shipper's right to offset damages against carrier's claim for freight charges, and cause was heard and disposed of in both trial and appellate courts solely on claimed ground of nonliability, shipper's right to offset damages could not be raised in Supreme Court, notwithstanding stipulation of parties that pleadings should be deemed amended to conform to proof.

In Bank.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

On rehearing.

Prior opinion sustained, and judgment of trial court reversed.

For prior opinions, see 34 P.(2d) 1012; 21 P.(2d) 667.

Christopher M. Jenks, of Oakland, and Dunne & Dunne and Dunne, Dunne & Cook, all of San Francisco, for appellants.

Augustin C. Keane, of San Francisco, for respondent.

Athearn, Chandler & Farmer, Frank R. Devlin, Jas. H. Hayes, and Walter Hoffman, all of San Francisco, amici curiæ for California Growers' & Shippers' Protective League.

PER CURIAM.

A rehearing was granted in this case to give consideration to the defendant's contention that the facts were not fully nor sufficiently stated in the opinion prepared by the District Court of Appeal, First Appellate District, Division 1, and adopted by this court as its decision on the former hearing, and that such further facts, when considered in relation to the other matters appearing and stated, would affect the final decision herein. Upon such reconsideration we are not persuaded that, on the record before us, any different result is appropriate. We therefore readopt the opinion of said District Court of Appeal as the correct disposition of the issues presented by the record. That opinion is as follows:

Appeals from the judgments in two separate actions which were consolidated for trial.

The actions were for the recovery of the authorized tariff or freight on ten cars of grapes shipped by defendant in 1922 from California to different eastern points. The Southern Pacific Company was the initial carrier. This company issued a straight bill of lading, signed by defendant, covering each car, and in which a representative of defendant or some person other than the fruit company hereinafter mentioned, was designated as the one to be advised upon the arrival of the car. After the cars reached plaintiff's line, it was instructed in writing by defendant to divert the same to the latter at Rochester, N. Y., and, with the exception of three of the cars, to advise the Puccia Fruit Company. As to the remaining cars, plaintiff was instructed to advise defendant's agent named in the instructions. After the cars arrived at Rochester, defendant's authorized agent instructed plaintiff, by writings referring to the several cars, to deliver the same without bill of lading to Puccia Fruit Company "upon payment of all freight and other charges. * * *" The fruit company was notified and thereafter unloaded the cars, giving plaintiff receipts for their contents. It is conceded that the fruit company had a 24-hour credit arrangement with the plaintiff. This was authorized by a rule of the Interstate Commerce Commission. The cars were delivered to the fruit company without plaintiff having received or demanded any part of the freight or charges due thereon. Subsequently the fruit company became insolvent, and a portion only of the unpaid freight was collected by plaintiff.

Defendant had no notice of the fact of non-payment until December 31, 1923.

As special defenses, defendant alleged that it was the custom to direct delivery of cars, as was done here, and that, as part of such custom, the word "advise," as used in the bill of lading or diversion orders, usually meant, and was so understood by the carrier to mean, that the person "to be advised has bought or is buying the grapes shipped subject to the payment of freight and other charges thereon, and that delivery of said shipment shall be made only upon payment of freight and all other charges, or upon notice from the consignor waiving such payment"; that defendant was not the owner of the grapes but the marketing agent for the growers; that this was the customary method of marketing such products; and that the carriers had notice of the facts. Further, that plaintiff "elected to collect from and extend credit to the fruit company and accepted from the latter its agreement to pay in lieu of payment" of the freight and other charges on delivery; that the fruit company about the time of the expiration of the credit period became insolvent; and that no notice was given to the defendant of the fact of nonpayment for more than a year after such deliveries.

It is admitted that plaintiff filed claims for the freight against the bankrupt estate, and received dividends aggregating \$334.18. There was no dispute as to the amount of the unpaid charges.

The court found in accordance with defendant's defenses, and plaintiff has appealed from the judgment entered thereon.

There was no evidence that the carriers knew that the defendant was not the owner of the grapes; and plaintiff contends that, in view of the other undisputed facts, those specially pleaded and found constituted no defense.

[1-6] The shipments being interstate, the rights and liabilities of the parties are governed by the acts of Congress as interpreted by the federal tribunals. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 36 S. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265. It was declared in *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900, that freight charges on interstate shipments are fixed by law, and no agreement by the carrier can reduce the amount legally payable, or release from liability a shipper who has assumed an obligation to pay the same; nor can any act or omission of the carrier, ex-

cept the running of the statute of limitations, estop or preclude the carrier from enforcing payment of the full amount by a person liable therefor. But the Interstate Commerce Act (49 USCA § 1 et seq.) does not impose upon the shipper an absolute obligation to pay the charges. As to this the carrier and the shipper are free to contract, subject to the rule which prohibits discrimination. The carrier is at liberty to require prepayment, or payment may be deferred until the goods reach the end of the transportation. *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 656, 35 S. Ct. 214, 59 L. Ed. 405. Where payment is deferred, the contract may provide that the shipper shall pay in any event, or merely that he shall pay if the consignee does not. Or the carrier may accept the goods for shipment solely on account of the consignee, and may contract that only the consignee shall be liable; or both the shipper and consignee may be made liable. The mere delivery of the goods to a carrier for transportation does not necessarily import an absolute promise by the shipper to pay the charges. To ascertain the contract, the bill of lading must be looked to primarily, as this serves both as a receipt and a contract. Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the charges, and this obligation is ordinarily a primary one. The shipper is presumably the consignor, and the transportation ordered by him is presumably on his own behalf, and a promise to pay may be inferred therefrom. This inference may, however, be rebutted, and it may be shown by the bill of lading or otherwise that the shipper was not acting in his own behalf, that this fact was known to the carrier, and that the parties intended, not only that the consignee should assume an obligation to pay, but that the shipper should not assume any liability whatsoever, or that he should assume only a secondary liability.

[7] The bills of lading covering nine of the cars mentioned are set out in the record. These provided that every service to be performed should be subject to the conditions therein, whether printed or written, including the conditions on the back thereof, to which the shipper agreed and accepted for himself and assigns. These, as stated, were signed by the defendant. Three contained the following provisions: "Section 7. * * * The owner or consignee shall pay the freight and average and all other lawful charges accruing on said property; but except in those instances where it may be lawfully authorized to do so no carrier by railroad shall de-

liver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all lawful charges accruing on said property except that, if the consignor stipulates by signature in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges, and the carrier, contrary to such stipulation, shall make delivery without requiring such payment the consignor shall not be liable for such payment."

On the face of these documents the following was printed: "If this shipment is to be delivered to the consignee without recourse on the consignor the consignor shall sign the following statement. * * * The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of Conditions.)" None was signed by the defendant.

In the first clause of section 7 following the provision "that the owner or consignee shall pay the freight and average and all other lawful charges accruing on said property, * * *" there is the stipulation that, "except in those instances where it may be lawfully authorized to do so no carrier or railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid." This stipulation clearly refers to those instances where, by statute or by rule of the Interstate Commerce Commission, the carrier is permitted to extend the time for payment of the charges. Such was the case here; and the extension given the fruit company, in view of the authority granted the carrier by the Commission, was not in violation of this clause of the bill of lading.

Six of the bills of lading contained the following provision: "Section 7. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery." No provision similar to those contained in the three bills of lading first mentioned, requiring collection of the freight upon delivery if stipulated by the consignor, appear thereon.

The bill of lading covering the remaining car, which was No. P. F. E. 10456, does not appear in the record, and the claim for the amount unpaid thereon will be hereinafter considered.

[8-11] The complaints alleged that the cars were delivered to defendant, but the court found that delivery was made to the fruit company. The physical facts were, of course, as found, but the legal effect of defendant's conduct, namely, its direction after the arrival of the cars that their contents be delivered to the fruit company without the production of the bill of lading, has been held to be such an exercise of ownership that their acceptance as consignee is necessarily implied. *Mellon v. Landeck*, 248 Ill. App. 353; *Dare v. New York Central R. Co.* (C. C. A.) 20 F.(2d) 379; *New York Central R. Co. v. Stanziale*, 105 N. J. Law, 593, 147 A. 457. Where a shipment is received by the consignee, a legal obligation arises to pay the freight whether the same be demanded at the time of delivery or later. *Pittsburgh, etc., Ry. Co. v. Fink*, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151; *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, supra; *Houston & T. C. R. Co. v. Lee County, etc., Co.* (D. C.) 14 F.(2d) 145. The authorities also hold without exception, so far as we are advised, that a mere direction by a consignor or consignee liable for the freight that a shipment be carried or diverted "freight collect" or delivered "upon payment of freight charges," or the like, is insufficient to relieve him of such liability. *Wabash Ry. Co. v. Horn* (C. C. A.) 40 F.(2d) 905; *Dare v. N. Y. Central R. Co.*, supra; *Mellon v. Landeck*, supra; *New York Central R. Co. v. Stanziale*, supra; *New York Central R. Co. v. Federal Sugar Refining Co.*, 235 N. Y. 182, 139 N. E. 234, 26 A. L. R. 1312; *Missouri Pacific R. Co. v. Pfeiffer Stone Co.*, 166 Ark. 226, 266 S. W. 82; *Southern Pacific Co. v. Oregon Growers', etc., Ass'n*, 127 Or. 364, 272 P. 281; *Seaboard Air-Line R. Co. v. Montgomery*, 28 Ga. App. 639, 112 S. E. 652; *Atchison, T. & S. F. Ry. Co. v. F. H. Stannard & Co.*, 99 Kan. 720, 162 P. 1176, L. R. A. 1917C, 1124; *Chicago Junction Ry. Co. v. Duluth Log Co.*, 161 Minn. 466, 202 N. W. 24, 26. Here the court said: "Under the uniform bill of lading * * * the consignor is given an opportunity to relieve himself from liability * * * by so indicating on the face of the bill." See, also, *Grand Trunk Western R. Co. v. Makris*, 142 Misc. 807, 255 N. Y. S. 443. In *New York Central R. Co. v. Warren Ross Lumber Co.*, 234 N. Y. 261, 137 N. E. 324, 24 A. L. R. 1160, it was held that the language of such a direction was not contractual, its effect being merely to give the carrier an option to demand payment from the person to whom it delivered the goods; and in *Western Maryland Ry. Co. v. Cross*, 96 W. Va. 666, 123 S. E. 572, that the com-

signor was liable notwithstanding such direction, unless otherwise stipulated by signature on the bill of lading. The general rule is stated in *Georgia, Florida & Alabama Ry. Co. v. Blish, etc.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948, where it was held that parties to a contract of interstate shipment by rail cannot waive its terms, nor can the carrier by its conduct give the shipper the right to ignore such terms and hold the carrier to a different responsibility than that fixed by the agreement made under the published tariffs and regulations.

[12-18] It was stipulated at the trial that the defendant was not the owner of the grapes but the agent for the owners, and, as stated, the court found that this was the customary way of marketing such products, and that the carrier was put upon notice of the facts. But, notwithstanding this finding, the defendant, as the consignee named in the bill of lading covering six of the cars, expressly agreed therein to pay the freight. As the consignee of three of the other cars, it made the same agreement, and the bill of lading provided that as consignor it should likewise be liable unless it stipulated by its signature on the face thereof that the carrier should not make delivery without requiring payment of the freight charges. Defendant's unqualified promises to pay, either as consignor or consignee or both, made it legally liable for the freight; and, as held in *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, supra, no act or omission, except allowing the statute of limitations to run, will estop or preclude the carrier from enforcing this obligation. While it was held in *Yazoo & M. V. R. Co. v. Zemurray (C. C. A.)* 238 F. 789, that, notwithstanding the obligation of the owner or consignor to pay, the carrier might be bound by its election to collect from a consignee, yet, as pointed out in *Main Island Creek Coal Co. v. Chesapeake & Ohio Ry. Co. (C. C. A.)* 23 F.(2d) 248, this conclusion was inconsistent with later decisions in *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, supra, that no act of the carrier could estop it from enforcing payment from any person legally liable. See, also, *United States v. United States Steel Products Co. (D. C.)* 27 F.(2d) 547, and *New York Central R. Co. v. Federal Sugar Refining Co.*, supra. And, according to the following decisions, the freight can be recovered from a shipper liable therefor, notwithstanding a custom, known to the carrier, that the amount should be paid by the consignee and deducted from the price of the goods, and

the consignee fails to pay: *Atchison, T. & S. F. Ry. Co. v. Hunt Bros. Fruit Co. (D. C.)* 34 F.(2d) 582; *Moss Lumber Co. v. Michigan Central R. Co.*, 219 Ala. 593, 123 So. 90; *Chicago, I. & L. Ry. Co. v. Peterson*, 168 Wis. 193, 169 N. W. 558; *Pennsylvania R. Co. v. Marcelletti*, 256 Mich. 411, 240 N. W. 4, 78 A. L. R. 923. It has also been held under facts similar to those here involved that a person to whom a shipment is delivered upon the order of the consignee is the assignee of the latter, and under the statute becomes liable as though named as such consignee. *New York Cent. R. Co. v. Warren Ross Lumber Co.*, supra; *Erie Ry. Co. v. H. Rosenstein, Inc.*, 249 N. Y. 241, 164 N. E. 37, 61 A. L. R. 415; *Pennsylvania Ry. Co. v. Titus*, 216 N. Y. 17, 109 N. E. 857, L. R. A. 1916E, 1127, Ann. Cas. 1917C, 862. This, however, as shown by the decisions hereinbefore cited, does not relieve a consignor or the original consignee who is liable for the freight; nor does the fact that the carrier received the note of a consignee therefor, or files a claim against his bankrupt estate, release others who are liable; nor does the failure to notify such persons of nonpayment have that effect, as the carrier's right to recover is only barred by limitation and not by laches. *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, supra; *Cleveland, C. C. & St. Louis Ry. Co. v. Southern Coal & Coke Co.*, 147 Tenn. 433, 248 S. W. 297; *Great Northern Ry. Co. v. Hocking Valley, etc. Co.*, 166 Wis. 465, 166 N. W. 41; *New York Cent. R. Co. v. Lehigh Stone Co.*, 220 Ill. App. 563. While usage or custom may limit the liability of shippers and carriers (17 Cor. Jur. Custom and Usage, § 74, p. 507), neither can be relied upon if it be in conflict with the terms of the contract (*Andrews v. Waldo*, 205 Cal. 764, 272 P. 1052; *Fuqua v. Thomas*, 96 Cal. App. 304, 273 P. 1091; *Rasmussen v. Pacific Fruit Exchange*, 111 Cal. App. 346, 295 P. 538); and, in view of the foregoing, it seems clear that neither the customs found by the trial court, the fact that the carrier filed a claim against the bankrupt, nor its failure to notify defendant that payment had not been made, constituted defenses to the action.

[19] The eighth count of the complaint as amended at the trial alleged a claim for the freight on car P. F. E. 10,456. The weight of the grapes therein was 33,856 pounds, and the total freight claimed was \$690.70. The correctness of these figures is not disputed. It was agreed at the trial that all the bills of lading were signed by the defendant or its authorized agent, and that a bill of lading

was issued for this car. This bill of lading, as stated, was not produced at the trial, and no direct evidence of its terms appears from the record. However, counsel for plaintiff, in opening its case, stated that all the cars were shipped on straight bills of lading in which the defendant was named both as consignor and consignee. Counsel for defendant in reply assented to this statement. It appears to have been undisputed that the missing bill of lading was in the same form as one of the two hereinbefore described. As we have seen, each form expressly provided that the consignee should pay the freight charges. Defendant, having signed the bill of lading, and being named therein as consignee, became obligated for the same reasons which apply to the other shipments, and this obligation was not discharged by what subsequently occurred.

[20, 21] The defendant contends that because several shipments extending over a period of about ten days or two weeks were involved, the plaintiff has been guilty of a course of conduct involving a breach of duty to the defendant and is liable to the defendant for the damages resulting therefrom, which under the facts it is stated would be equivalent to the amount of the freight charges involved. The defendant, referring to *Chicago & North Western Railway Co. v. Lindell*, 281 U. S. 14, 50 S. Ct. 200, 74 L. Ed. 670, contends that such a claim for damages may be offset against the claim for freight charges, and, relying upon such cases as *Interstate Window Glass Co. v. New York, N. H. & H. R. Co.*, 104 Conn. 342, 133 A. 102, and *Estherville Produce Co. v. Chicago, R. I. & P. R. Co.* (C. C. A.) 57 F.(2d) 50, insists that the plaintiff in the present case is liable to it for damages for breach of duty consisting of two elements: First, the alleged violation of ex parte order No. 73 promulgated by the interstate commerce commission pursuant to the authority granted by subdivision 2 of section 3 of the Interstate Commerce Act (US CA, title 49, p. 157), which provides that the carrier, upon taking precautions deemed by it to be sufficient to insure payment of the freight charges, may relinquish possession in advance of payment and may extend credit for a period of ninety-six hours. *San Pedro, Los Angeles & Salt Lake R. Co.*, 75 I. C. C. 463, 591. In this connection it is not disputed

that the carrier had a twenty-four hour credit arrangement with the Puccia Fruit Company, but it is contended that the repeated deliveries under this credit arrangement, at a time when freight charges on prior deliveries remained unpaid, constituted the violation and breach amounting to conversion of the shipments by the plaintiff with resulting liability for damages. The second element is the alleged conversion by the plaintiff by reason of the delivery of the shipments contrary to the express instruction received by the carrier after the shipments had arrived at their destination, to deliver the fruit to Puccia Fruit Company upon payment of the freight charges. There is a complete answer to the arguments advanced in connection with these contentions. It must be noted first of all, with respect to the claimed violation of ex parte order No. 73, that inasmuch as the liability of the shipper pursuant to its contract was not changed by the existence of any alleged custom, the extension of credit was likewise made to the defendant. The defendant's claim for damages, if it may be deemed to have one, and this question we do not decide, must therefore rest on its claim of conversion by reason of the delivery contrary to the instruction to relinquish the shipments on payment of freight charges. But in any event the contention that the defendant is entitled to an offset on the theory that the plaintiff has converted the goods comes too late. The pleadings of the defendant do not tender the issue nor do they purport to claim an offset under any theory. The stipulation between the parties in this case that the pleadings be deemed to be amended to conform to the proof is not sufficient to supply that omission. The issue presented by the defendant's answer and pursuant to which evidence was offered, and the theory upon which the trial was had and the appeal argued before the District Court of Appeal, was the claimed nonliability of the defendant because of the custom alleged to exist in respect to the shipment of produce from California to the eastern market. We conclude that the District Court of Appeal has correctly stated the law applicable to the facts on the issue of the defendant's liability under its contract of shipment and that that was the only issue for determination presented by the record.

The judgments are reversed.

**SUMMERS v. INDUSTRIAL ACCIDENT
COMMISSION.**

L. A. 14466.

Supreme Court of California.

Dec. 5, 1933.

Appeal from ruling of Industrial Commission.

See (Cal. App.) 24 P.(2d) 366.

J. L. Kearney, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, and Loeb, Walker & Loeb and Herman F. Selvin, all of Los Angeles, for respondents.

PER CURIAM.

Upon stipulation, it is ordered that the award sought to be reviewed be and the same is hereby affirmed.



2 Cal.2d 465

**BROADWAY IMPROVEMENT & INVEST-
MENT CO. v. TUMANSKY et al.**

L. A. 13745.

Supreme Court of California.

Feb. 21, 1935.

Fixtures ⇨ 18(1)

Elevator system, frigidaire system, wall beds, and gas steam radiators connected to gas pipes by means of slip joint threaded unions and flanges in apartment building held "fixtures," within trust deed securing construction loan which passed to purchaser upon sale under senior trust deed as against purchasers at prior foreclosure sale under junior trust deed and chattel mortgage.

[Ed. Note.—For other definitions of "Fixture," see Words & Phrases.]

In Bank.

Appeals from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Broadway Improvement & Investment Company against Harry Tumansky and Betty Tumansky, who filed a cross-complaint. From judgment rendered, both parties appeal.

Affirmed in part, and reversed, with instructions, in part.

Sherman & Sherman, of Los Angeles, f plaintiff.

C. F. Seccombe, Huntington P. Bledsoe, and Seccombe & Bledsoe, all of Hollywood, for defendants.

THOMPSON, Justice.

Plaintiff and defendants have both appealed from portions of the judgment rendered in this action; the plaintiff being dissatisfied with that portion of the judgment which declared that the defendants were entitled to the immediate possession of 75 Pittsburg automatic gas steam radiators installed in an apartment house in Los Angeles, and the defendants contending that the portion of the judgment which enjoins them from removing a complete elevator system, a complete Frigidaire refrigeration system, and 56 wall beds is erroneous. The defendants and appellants have abandoned their claims to the hot water heating plant and 48 sets of bathroom appliances. Both parties rely upon the judgment roll alone.

The findings of fact disclose that one Clyde S. Riedel was the owner of certain unimproved real property on March 24, 1927, at which time he borrowed from the American Mortgage Company \$120,000, securing the payment of the notes given to evidence the loan by a deed of trust; it being the purpose of Riedel and the mortgage company that the loan so made should be used for the construction of an apartment house in accordance with plans and specifications theretofore prepared. Subsequent to the execution and recordation of the trust deed, a four-story brick apartment building containing 48 units was erected, but prior to the completion of the building, Clyde S. Riedel sold his interest in the property to J. J. Straus, who completed the building and equipped it. Straus installed the property here in controversy. The elevator system, the Frigidaire system, and the wall beds were purchased upon conditional sales contracts, but shortly thereafter the property so purchased was paid for in full by Straus or his successors in interest. After the building was completed and wholly equipped, Straus sold the property to El Capitan, Inc., a corporation, which concern transferred title to William M. Hunt. On May 9, 1929, William M. Hunt executed to El Capitan, Inc., a promissory note in the sum of \$47,500, payable in installments and secured by a second deed of trust. This second trust deed not only described the real property but also contained a description of certain furniture and furnishings, including the 48 wall beds and

Frigidaire units. Hunt also executed a chattel mortgage containing a description of the furniture in the apartment house, including the 48 wall beds and Frigidaire units. No mention was made in the trust deed or in the chattel mortgage of the elevator system or of the gas steam radiators. Subsequently El Capitan, Inc., sold the trust deed and chattel mortgage to the defendants and appellants. Hunt defaulted in the payment of the promissory note secured by the second deed of trust and, upon foreclosure sale, the defendants became the purchasers and went into possession of the property, subject, however, to the deed of trust executed by Riedel on March 24, 1927. Hunt had also defaulted in payment of the note secured by this first trust deed, which, in the meantime, had been assigned to the plaintiff, and on June 6, 1931, plaintiff became the purchaser at trustee's sale under the first deed of trust.

Plaintiff claims the property upon the theory that it was affixed to and became a part of the realty, and the defendants claim upon the contention that it did not become part of the realty. The court found, in addition to what we have already recited, that all of the property was installed by J. J. Straus with the intention "that said property should permanently remain in said building and be used in connection therewith and become an appurtenance thereto." With respect to the elevator system it was found that it ran from the basement to the roof of the apartment house on steel rails bolted to the walls of the apartment house, that the motor machinery and control units were bolted by means of heavy iron bolts to the floor of the pent house, and that it is of great weight and cannot be removed except by means of mechanical instruments. With respect to the Frigidaire system the court found that it was controlled by two motor compressing units situated in the basement in an especially constructed room connected by means of union joints to the water supply of the building and connected to the electrical energy system of the apartment house by means of copper wires run through conduits and connected to the control board on the wall of the building by copper pipes attached by union joints, that the control board is attached to the building by means of bolts and heavy screws, that each distribution box is in turn connected by union joints to copper valves and pipes which run throughout the apartment house, and that the system is a necessary appurtenance to the apartment building. With respect to the wall beds it was found that each bed consisted of a steel

frame and necessary attachments whereby it was attached to the doors. With respect to the 75 gas steam radiators the court found that they were not attached to the floors, except that each radiator was connected by means of a "slip joint threaded union and flange" to a gas pipe in each room and the lobby and that they could not be removed except by unscrewing with a wrench.

As conclusions of law the court determined that the elevator system, the Frigidaire system, and the wall beds were fixtures and covered by the first trust deed, but also held that the gas steam radiators were personal property and were not covered by the first trust deed.

We think that both appeals are determined and governed by the two cases of *Hammel R. Corp. v. Mortgage Guar. Co.*, 129 Cal. App. 468, 18 P.(2d) 993, and *Dauch v. Ginsburg*, 214 Cal. 540, 6 P.(2d) 952, 953. It is manifest that the findings of the court that the elevator system, Frigidaire system, and wall beds were attached to the realty so as to become fixtures cannot, under the authorities cited, be disturbed. It is equally obvious that the finding with respect to the gas steam radiators is sufficient to compel us to declare that they were also attached to the building in such a way as to become fixtures and a part of the realty. In the case of *Dauch v. Ginsburg*, supra, the heating fixtures were "attached to the rough plumbing by means of slip joint threaded unions and flanges," and this court determined that they had become fixtures and that their removal would substantially damage and injure the property. It further said: "The plumbing and heating fixtures are permanent in character, and absolutely essential to the purpose for which the building was constructed. The hotel building would not be a hotel building without those fixtures." The same conclusion was reached in the other case, also involving gas steam radiators, and the trial court's judgment was reversed.

It follows that that portion of the judgment which declares that Harry Tumansky and Betty Tumansky, his wife, have no right, title, or interest in or to the elevator system, the Frigidaire system, the water heating plant, 56 wall beds, and 48 sets of bathroom appliances should be, and it is, affirmed. The second portion of the judgment, however, which declares that the defendants Harry Tumansky and Betty Tumansky, his wife, are entitled to the immediate possession of 75 Pittsburg automatic gas steam radiators, or in the event possession there-

of cannot be had, then a judgment against plaintiff for the value in the sum of \$1,875, is reversed, with instructions to the trial court to enter judgment for the plaintiff for the 75 Pittsburg automatic gas steam radiators.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.



2 Cal.2d 414

CLOGSTON v. SCHIFF-LANG CO., Inc.
L. A. 12798.

Supreme Court of California.
Feb. 1, 1935.

Contracts §292½

Each party to contract, providing for settlement of their differences by arbitration, may insist on execution of such provision (Code Civ. Proc. §§ 1280, 1284).

In Bank.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by H. D. Clogston against the Schiff-Lang Company, Inc. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinion, 32 P.(2d) 390.

Rohe, Dottenhelm & Weikert and G. V. Weikert, all of Los Angeles (Robert P. Dock-
eray, of Los Angeles, of counsel), for appel-
lant.

Andrew J. Copp, Jr., of Los Angeles, for
respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 1. Upon further consideration, we adopt the opinion of Mr. Justice Houser as the opinion of this court. It reads as follows:

Among the provisions of a contract that was entered into between plaintiff and defendant was the following: "Any differences arising between the parties of this contract shall be settled by arbitration, and buyer

shall accept goods with such allowance or award as shall be determined by such arbitration, each shipment to be considered separately."

Thereafter, "differences" having arisen between the parties to the contract, without first having arbitrated such "differences," and in the absence of any attempt so to do on the part of plaintiff, he commenced an action in the superior court against defendant for damages, which plaintiff claimed he had sustained by reason of the alleged breach of the contract on the part of defendant.

As far as the same is applicable to the facts herein, section 1280 of the Code of Civil Procedure provides that: "A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract * * * shall be valid, enforceable and irrevocable, save upon such grounds as exists at law or in equity for the revocation of any contract. * * *"

By section 1284 of the Code of Civil Procedure it is provided that: "If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration."

Defendant demurred to the complaint in the action, and, in accordance with the rules of the superior court, attached to said demurrer its memorandum of "points and authorities" in which was contained the statement that: "The complaint shows upon its face that there was an agreement in writing to arbitrate any differences arising under the contract sued upon, and there is no allegation that an arbitration has been had or that plaintiff has offered to submit to arbitration." (Citing authorities.)

The demurrer was overruled. In its sixth affirmative defense, defendant again pleaded the defense that the contract contained the provision hereinbefore set forth, and "that in accordance with said provision in said contract in writing, said defendant has offered in writing, to submit to arbitration the differences between plaintiff and defendant, arising out of said contract in writing, which differences are the subject matter of this action, but plaintiff has failed, neglected and re-

fused, and still fails, neglects and refuses to submit the said differences or any of them to arbitration."

On the trial of the action, with reference to the issue of the right of arbitration, the trial court found "that it is not true that said contract provided for the settlement of any and/or all differences between the plaintiff and defendant arising out of said contract by arbitration to the exclusion of the settlement of said differences by the courts of the state of California."

From a judgment rendered in favor of plaintiff, defendant has appealed to this court.

Although prior to the year 1927, at which time the statutes of this state with reference to the subject of "arbitrations" were amended and new statutes added, it was generally held by our courts that an agreement such as was made by the parties to the instant action was not specifically enforceable, since the time when such amendments to the statutes became effective the trend of the rulings of this state uniformly has been to the effect that such a provision in a contract entitles each of its parties to insist upon its execution. *Pacific Orient Co. v. Superior Court*, 203 Cal. 797, 262 P. 1117; *Jardine, Matheson & Co. v. Pacific Orient Co.*, 100 Cal. App. 572, 280 P. 697; *Landreth v. South Coast Rock Co.*, 136 Cal. App. 457, 29 P.(2d) 225. And in those jurisdictions (especially in the state of New York) in which arbitration laws identical in character, if not in language, with those of this state have been the subject of consideration, the rulings thereon with reference to the point here at issue have been in accord with those announced by our appellate tribunals. *Berkovitz v. Arbib & Houlberg*, 230 N. Y. 261, 130 N. E. 288; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582; *Pacific Indemnity Co. v. Insurance Co. of North America (C. C. A.)* 25 F.(2d) 930; *S. A. Wenger & Co. v. Propper Silk Hosiery Mills*, 239 N. Y. 199, 146 N. E. 203; *American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, 240 N. Y. 398, 148 N. E. 562.

Even before the 1927 amendments to the arbitration statutes became effective, in the case of *Davison v. East Whittier L., etc., Co.*, 153 Cal. 81, 82, 83, 96 P. 88, it was held that a provision in a contract such as that in the instant case was enforceable, that (syllabus) "such arbitration, or an unsuccessful attempt to secure the same, is a condition precedent" to the right to maintain an action for breach of the contract, and that, in the

absence of arbitration of, or any attempt on the part of, the plaintiff to arbitrate, any contractual differences which had arisen between him and the defendant therein, in connection with an asserted cause of action, a judgment rendered in favor of the plaintiff in the action for a breach of the contract should be reversed.

See, also, a comprehensive note on commercial arbitration in California, 17 California Law Review, 643.

The judgment is reversed.



SECURITY BUILDING & LOAN ASS'N OF LOS ANGELES v. SEIBERT et al. *

Civ. 8764.

District Court of Appeal, Second District,
Division 1, California.

Feb. 20, 1935.

Rehearing Granted March 22, 1935.

1. Corporations ⇨432(12)

Corporation by uncontradicted evidence that only two of its five directors knew that corporation had guaranteed notes it had assigned to plaintiff and that extent of knowledge of one was that he had signed guarantees at request of other held to have overcome prima facie evidence of execution by authority of corporation existing by virtue of corporate seal appearing on guarantees.

2. Corporations ⇨432(12)

Rule that authority of agent to act for corporation may be proven by evidence other than minutes of its board of directors or contract in writing could not aid assignee of notes in proving that director was authorized to guarantee notes where uncontradicted evidence showed that corporation had never directed act to be done or conferred on director any general authority under which he could have acted.

3. Corporations ⇨397

Corporation is not bound by acts of its officers or employees unless they are by corporation vested with general authority to transact all business falling within scope of corporate purposes, or vested with special authority to do some particular act, or unless corporation has held such officers or employees out to public as possessing authority

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 44 P.2d 416.

to act for it according to general practice of its business.

4. Corporations ⚡425(4)

Corporation holding out to the world as its agents persons apparently clothed with power to transact its ordinary business will not be permitted to cause third persons to suffer from acts of such agents by defense that ostensible authority was not in fact conferred.

5. Corporations ⚡425(3)

Corporation having no knowledge that an officer or agent is presuming to act for it without authority cannot be bound by one isolated transaction of which it had no information at any time.

6. Corporations ⚡429

Rule of ostensible authority is only extended for benefit of persons dealing with corporation's agent in good faith and in ignorance of any limitations on his authority.

7. Corporations ⚡429

In action against corporation on its guarantees of notes which it had assigned to plaintiff corporation, plaintiff could not rely on ostensible authority of officers to execute guarantees where no course of dealing existed between corporations and officers executing guarantees were also officers of plaintiff, so that if such officers were authorized to accept notes for plaintiff, knowledge of either of them that guarantees had been executed without authority would be imputed to plaintiff.

8. Corporations ⚡426(10)

In action against corporation on its guarantees of notes which it had assigned to plaintiff corporation where any advances of money made to defendant had been made prior to transfer of notes and without any agreement to furnish security for indebtedness created, defendant *held* not estopped, on ground that it had received benefits, from asserting invalidity of unauthorized transfers and guarantees.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by the Security Building & Loan Association of Los Angeles against Anna L. Seibert and the Durex System, Limited. From an adverse judgment, the Durex System, Limited, appeals.

Reversed.

E. T. Young, of Los Angeles, for appellant Durex System, Limited.

Julius V. Patrosso, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Durex System, Limited, a corporation, appeals from a judgment rendered against it in an action brought on its guarantees of three promissory notes originally secured by deeds of trust.

Metropolitan Capital Corporation, formerly known as Metropolitan Guaranty Corporation, during the time of the transactions in controversy owned stock in the Security Building & Loan Association and some of its officers had an executory contract for the purchase of 1,200 additional shares. These with what the Metropolitan Corporation owned constituted a controlling interest. C. T. Owen was vice president of the Metropolitan Corporation and president of the building and loan association. M. M. Hurford was vice president of the building and loan association and an officer and director of the Metropolitan Corporation.

In April, 1930, one H. C. Von Stein entered into a contract with the Metropolitan Corporation under which he agreed to incorporate Durex System, Limited, to engage in the business of constructing buildings. It was provided that stock in the Durex corporation amounting to a controlling interest was to be issued to the Metropolitan Corporation in consideration of its agreement to advance to the former money with which to carry on its business. The corporation was thereafter organized and at the time of the transactions in question had as officers Owen, second vice president; Von Stein, vice president and general manager; and Hurford, secretary. Its stock, although subscribed for, was never actually issued.

The agreement of the Metropolitan Corporation was to provide money for salaries, advertising, operating expenses, and other incidental items for nine months after the organization of Durex corporation. These advances were not to be a capital investment, but were to be repaid before any dividends were declared. The apparent understanding was that, in addition to providing money for expenses, Metropolitan Corporation was to finance the building operations of Durex corporation. The contract does not contain any provision to this effect, but there is a stipulation that Metropolitan Corporation was to be paid 5 per cent. of each building contract to cover financing charges.

The three corporations had offices in the same rooms and Owen is described as the dominating character of all three. Apparently, he directed the officers of each corpora-

tion. The extent to which this was done is indicated by the testimony of Hurford that he did not know whether he was secretary or treasurer of the Metropolitan Corporation in addition to being a director; that he signed the minutes of directors' meetings of Durex corporation as Owen prepared them; that Owen often brought him various papers to sign as an officer of one corporation or the other; and that he always did so without question.

Shortly after the organization of the Durex corporation, it obtained a contract to erect a building for Anna L. Seibert. This building was financed with her note for \$24,000, secured by a deed of trust which was a first lien, and three notes made by her, two for \$2,500 each and one for \$9,667, all three being secured by a deed of trust which was a second lien. All of the notes were dated May 21, 1930, and were payable to the Durex corporation. These notes, according to Von Stein, were turned over by him to Gates and Owen of the Metropolitan Corporation for safe-keeping for the Durex corporation. They were thereafter passed on to the plaintiff in transactions manipulated by Owen under circumstances in which much is left to inference.

The three notes originally secured by the second trust deed and sued upon in this case each bear the following: "Los Angeles, Cal., Sept. 4, 1930. For value received we hereby assign and transfer to the Metropolitan Capital Corporation the within trust deed note together with all rights accrued or to accrue by virtue of deed of trust securing said note and do hereby guarantee payment of principal and interest and waive demand protest and notice of protest covering said note. Durex System, Ltd., C. T. Owen, Vice-President, M. M. Hurford, Secretary. (Seal.)" Plaintiff, to whom the notes were thereafter transferred by the Metropolitan Corporation, brings its action upon these contracts of guaranty.

Hurford's remembrance of the execution of the guarantees was exceedingly hazy. He remembered having signed them at Owen's request. He was the secretary of the Durex corporation and was charged with responsibility for the seal, but Owen kept it. He had no recollection of affixing the corporate seal to the notes, but expected Owen to affix the seal to any papers where it was necessary. He did not know of any consideration received by the Durex corporation for the assignments or the guarantees, nor the purpose of the transfers and he never heard the subject of the notes discussed. The minute book of

the Durex corporation contains no resolution authorizing or ratifying the assignments or guarantees or any mention of them whatever until a later contract was made.

During construction of the Seibert building, money was advanced to the Durex corporation by the Metropolitan Corporation. Von Stein, who was general manager of the Durex corporation, testified that he received it "as the building progressed as usual"; that the contract of the Metropolitan Corporation provided for financing the job through advancing money for construction; and that he understood that they had capital sufficient to do this. According to him, notes and deeds of trust received by the Durex corporation from its customers were to be used by the Metropolitan Corporation after the completion of the buildings.

The books of the Metropolitan Corporation show that on September 3, 1930, it had advanced to the Durex corporation amounts aggregating \$30,000, most or all of which was undoubtedly for paying the cost of construction of the Seibert building. On September 4th its books show the Durex corporation credited with \$38,367 on account of the transfer to it of the four Seibert notes. This represents their face value less \$300 which is immaterial here. No mention is made in the books of the Metropolitan Corporation of any guaranty of the notes, nor was any contingent liability set up in connection with them.

According to Von Stein, nothing was ever said to him by any one on the subject of transferring the notes and trust deed. The first time he knew that the notes had been transferred or attempted to be transferred was some months later when a settlement of the affairs of the Metropolitan Corporation and the Durex corporation was worked out. In a contract executed by the two corporations in March, 1931, for the purpose of adjusting their accounts, Durex corporation assigned and delivered to Metropolitan Corporation "all right, title and interest which it now has or may hereafter at any time have in and to a second trust deed made, executed and delivered by Anna L. Seibert." No mention of any guaranty is made in this contract, nor is any previous transfer of the notes referred to. At that time, Von Stein testified, he thought all three notes sued upon were still in the possession of the Durex corporation.

Appellant claims that this evidence is insufficient to justify the decision and findings of the trial court, and that the findings and decision and the judgment based thereon are against law. The principal point raised is

that the evidence does not show any contract of guaranty which binds the Durex corporation.

This is not the usual case where the acts of an officer or agent of a corporation are challenged. Here Owen was acting for all three corporations. They were all managed and controlled by him. He apparently passed the notes from one to the other without consulting any other officer of either corporation. He assumed to act with the property of the three corporations as he would have done if he had been the individual owner of them.

[1] While it is true that the corporate seal on each of the three guarantees is prima facie evidence that they were executed by authority of the corporation, the defendant fully met the burden of proof which thereupon shifted to it. The Durex corporation had five directors at the time. There is no evidence that any director other than Owen and Hurford ever knew anything about the transaction. All Hurford knew of it was that Owen told him to sign and he did so. There is here no conflict between the presumption of regularity and the evidence. All of the material facts stand practically undisputed. The case of *Gray v. Fred B. Neuhoff Co.*, 124 Cal. App. 567, 12 P.(2d) 1036, so strongly relied upon by respondent does not, therefore, apply.

[2] The authority of an agent or officer to act for a corporation may be proven by evidence other than the minutes of its board of directors or by a contract in writing. *Davis v. Pacific Studios Corp.*, 84 Cal. App. 611, 258 P. 440. But such proof must be of acts or conduct showing that the corporation itself, by direction of its directors individually if not in formal meeting, or by giving one of the officers authority to negotiate and act for the corporation, or in some other way, authorized the particular act to be done. Where authorization is shown, courts will not demand formal record of such authorization. But this rule cannot aid the respondent in the face of the evidence that the corporation never directed the act to be done, or conferred upon Owen any general authority under which he could have acted in this particular case.

[3] The by-laws of Durex corporation provided: "The Board of Directors, except as in these By-Laws otherwise provided, may authorize any officers, officer or agent or agents of the Corporation to enter into any contract or execute and deliver any instrument in the name and on behalf of the corporation, and such authority may be general or confined to specific instances, and, unless so authorized

by the Board of Directors, no officer, agent or employee shall have any power or authority to bind the corporation by any contract or engagement or to pledge its credit or to render it liable pecuniarily for any purpose or to any amount." There is no evidence that either Owen or Hurford ever executed any other instruments without express authorization except the assignment of the first trust deed note of \$24,000. The assignments of the four notes were all parts of the same transaction, although it does not appear that the assignment of the first note included a guaranty. No course of dealing between the parties is shown. The Seibert deal must have been about the first business undertaken by the Durex corporation after its organization and before any business practice had been established. "It is well settled that a corporation is not bound by any act or acts of its officers or employees unless they are by the corporation vested with general authority to transact any and all of the business falling within the scope of its corporate purposes, or vested with special authority, through formal action of its board of directors, to do some particular act within the limits of its charter powers, or unless the corporation has held such officers or employees out to the public as possessing authority to act for it according to the general usage, practice, and course of its business." *Title G. & T. Co. v. Hammond Lbr. Co.*, 62 Cal. App. 245, 254, 216 P. 953, 957.

[4, 5] It is urged that Owen and Hurford had ostensible authority to execute the contract. But to be bound by the rule of ostensible authority, the corporation must hold out to the world as its agents persons apparently clothed with power to transact its ordinary business. When it does so, third parties will not be permitted to suffer from the acts of such agents by the corporation's attempted defense that the ostensible authority was not in fact conferred. *Newton v. Johnston Organ, etc., Mfg. Co.*, 180 Cal. 185, 180 P. 7. Under this rule there must be a more or less habitual course of conduct of the officer or agent and acquiescence by the corporation in his acts. Where there is no knowledge that an officer or agent is presuming to act for it, without authority so to do, the corporation cannot be bound by one isolated transaction of which it had no information at any time.

[6, 7] The building and loan association can hardly be said to be a third person in the ordinary legal use of that term. Owens and Hurford were each an officer in all three cor-

porations. If Owen and Hurford, as officers of Durex corporation, were held out by that corporation as possessing certain authority, then Owen and Hurford, as officers of the building and loan association, knew the extent of their authority. The rule of ostensible authority is only extended for the benefit of persons dealing with the corporation's agent in good faith and in ignorance of any limitations on his authority. *Davis v. Pacific Studios Corp.*, *supra*. Under the facts in this case, the contracts sued upon cannot be upheld upon the ground that the guarantees were executed with ostensible authority.

Counsel urges on the authority of *Utah Const. Co. v. Western Pac. Ry. Co.*, 174 Cal. 156, 162 P. 631, that the knowledge of Owen or Hurford, as officers of the building and loan association, was not knowledge of the corporation. The knowledge of the officer in the case cited was held not imputable to the corporation on the ground that knowledge of the agent is only knowledge to the principal in matters which are within the agent's authority to act. In later cases the rule has not been limited so strictly. In the case of *Jan Wai v. Smith-Riddell Co.*, 55 Cal. App. 59, 63, 202 P. 952, 954, the court said: "Appellant contends that—There is no 'evidence to show that F. H. Smith was the agent of defendant, or that he had any power to bind appellant in any manner whatever.' It must be kept in mind that this is not the ordinary case of simple agency, but that Smith was president of the defendant corporation, and, in so far as the evidence discloses, was in the active management of its affairs. * * * He, of course, had full knowledge of his agreement with plaintiffs. Being president of the corporation, his knowledge was equally the knowledge of the corporation. In *Balfour v. Fresno Canal, etc., Co.*, 123 Cal. 395, 397, 55 P. 1062, it is said: 'The president of a corporation is a proper person to whom notice, which is to affect a corporation, is to be given. The corporation has no eyes, ears, or understanding save through its agents. The president is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interests of the corporation. And the presumption is that

he does so. Usually this is a conclusive presumption. * * * Corporations can only be reached through their agents; it behooves them to be especially careful in regard to the conduct of their agents. In no other way can knowledge be conveyed to the fictitious entity, or negotiations be had with it. It is not usual for parties dealing with a corporation to be brought before the directors to negotiate their contracts.' See, also, *Lowe v. Yolo County, etc., Water Co.*, 157 Cal. 503, 513, 108 P. 297; *Swartz v. Burr* [43 Cal. App. 442], 185 P. 411." See, also, *Davis v. Pacific Studios*, *supra*. Under either statement of the rule, if either Owen or Hurford had authority to accept the notes for the building and loan association, the knowledge of either one of them that the guarantees had been executed without any authority is imputed to that corporation.

[8] Respondent further contends that as the Durex corporation received and retained the benefits of the transaction, it cannot repudiate liability and escape the burdens upon the ground that the transaction was not authorized. But what benefits did the Durex corporation receive?

According to the evidence, some time prior to the execution of the guarantees, the Metropolitan Corporation had advanced money to the Durex corporation. Even if it was not obligated to do this under its contract, the advances had been made prior to the transfer of the notes. There is no evidence that the Durex corporation received the money under any agreement express or implied that it was to furnish any security for the indebtedness, nor transfer in payment or otherwise any trust deeds which it had theretofore taken for the Seibert job. The contract of the parties provides that Durex corporation was to keep its own paper and collect the payments thereon. Under such circumstances, defendant is not estopped from asserting the invalidity of the unauthorized transfers and guarantees.

The evidence is insufficient to sustain the judgment. Judgment reversed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

4 Cal.App.2d 575

RANDALL v. EVANS.

Civ. 8766.

District Court of Appeal, Second District,
Division 1, California.

Feb. 14, 1935.

1. Automobiles ⇐6

Statute amended after automobile accident but before trial *held* one of applicable rules of evidence (St. 1931, p. 2120, § 113 (d).

2. Automobiles ⇐242(8)

In collision case, where plaintiff testified that his automobile was traveling between 20 and 25 miles an hour through intersection constituting obstructed crossing within statute, defendant motorist had burden of proving that such speed constituted negligence (St. 1923, p. 553, § 113 (b) (2); St. 1931, p. 2120, § 113 (d).

3. Appeal and error ⇐1011(1)

Court's finding on conflicting evidence on fact question in trial without jury cannot be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Clifford M. Randall against John M. Evans. Judgment for plaintiff, and defendant appeals.

Affirmed.

Kidd, Schell & Delamer, of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Defendant appeals from a judgment rendered against him in an action for personal injuries. He contends that the evidence affirmatively shows as a matter of law that the plaintiff was guilty of negligence proximately contributing to the happening of the accident, and, further, that the evidence is insufficient to support the finding of fact that the defendant was guilty of negligence.

The personal injuries for which plaintiff claims damages were sustained in a collision between two automobiles, one of which was driven by him and the other by the defendant. Plaintiff was traveling east on Washington street in the city of Los Angeles, approaching the intersection of Griffith avenue. This was an obstructed crossing, so far as his view was concerned, within the meaning of the

California Vehicle Act (St. 1923, p. 553, § 113 (b)(2), Deering's Gen. Laws, 1931 Ed., Act 5128, § 113(b)(2). Defendant was traveling north on Griffith avenue. The intersection has automatic traffic signals which were operating at the time of the accident. The vehicles collided in the intersection somewhere near the southeast corner of the streets.

Although there is some conflict in the testimony concerning the signals as plaintiff approached the corner, he testified that the semaphores showed the word "Go" for east and west traffic, and we must assume this to be true. However, he also testified that he was traveling between 20 and 25 miles per hour as he entered and passed through the intersection. This speed, appellant contends, constituted negligence as a matter of law and prevents a recovery.

[1-3] The accident occurred on August 25, 1930. The trial commenced May 31, 1932. The Legislature of 1931 amended the California Vehicle Act by adding subdivision d to section 113 (St. 1923, p. 553, as amended by St. 1931, p. 2120). This amendment was effective in August, 1931, and became one of the rules of evidence in this case. *Pilcher v. Tanner Motor Livery*, 138 Cal. App. 558, 33 P. (2d) 58. Under the new law plaintiff was not guilty of negligence as a matter of law, and the burden of proof was on the defendant to establish that the operation of the vehicle at the speed shown by the evidence constituted negligence. This issue of fact has been determined adversely to the defendant upon conflicting testimony. We cannot disturb the finding of the trial court that plaintiff was not guilty of negligence at the time of the happening of the accident.

Appellant also asserts that the evidence shows affirmatively that plaintiff did not look as he entered the intersection, hence he was guilty of negligence, and that the evidence for that reason is insufficient to support a judgment in his favor. The evidence does not show that plaintiff failed to look to his right as he approached and entered the intersection. The extent to which he looked and the points where he observed traffic which might endanger him is shown by the evidence. The trial court's finding that he was not guilty of negligence is the determination upon sufficient evidence, of an issue of fact against the defendant, and cannot be reviewed upon appeal.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

4 Cal.App.2d 673

RAMSPERGER v. LOS ANGELES MOTOR COACH CO. et al.

Civ. 9231.

District Court of Appeal, Second District,
Division 2, California.

Feb. 20, 1935.

Hearing Denied by Supreme Court
April 18, 1935.**1. Automobiles** ⇨160(3, 4), 168(1)

Bus company held not liable for injuries sustained by pedestrian who was struck by bus while crossing street in the evening, where street lights were somewhat obscured by holiday decorations, bus had its headlights on, was lighted inside and made quite a bit of noise, and was proceeding at rate of speed of 10 to 15 miles per hour (St. 1931, p. 2127, § 131½; St. 1929, p. 541, § 129).

2. Automobiles ⇨227(3)

Pedestrian who was hit by bus when pedestrian ran across street near street intersection after having looked to pedestrian's right, from which direction bus was coming, could not invoke doctrine of "last clear chance" in aid of recovery for injuries, since doctrine does not apply where both parties are contemporaneously and actively in fault down to very moment of injury; such fault proximately contributing to collision (St. 1931, p. 2127, § 131½; St. 1929, p. 541, § 129).

[Ed. Note.—For other definitions of "Last Clear Chance," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Augusta L. Ramsperger, an incompetent, by Anna R. Dempster, her guardian ad litem, against the Los Angeles Motor Coach Company, a corporation, and others. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Ford & Johnson, of San Francisco, and Loyd Wright, of Los Angeles, for appellant.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiff, a pedestrian, sued to recover damages for injuries incurred when she was involved in an accident with a motor coach owned by corporation defendants and operated by the other defendants, their employees. Following the accident she became incompetent, due, it is asserted, to injuries then inflicted. At conclusion of plaintiff's case, motion for nonsuit was granted on grounds that

the evidence failed to show negligence of defendants and did disclose contributory negligence as a matter of law on the part of plaintiff. From judgment entered thereon, plaintiff appeals.

[1] The accident occurred near the southeast corner of Wilshire and Westwood boulevards at about 6 o'clock in the evening of the 19th of December. Defendants' bus had been going south on Westwood and had stopped for a traffic signal at the intersection of Wilshire. When the signal said "Go," the bus turned left to go south on Wilshire, proceeding at about 10 to 15 miles an hour, and may have swerved sharply to the right just before the moment of impact, which occurred at a point in the south half of Wilshire and from 10 to 15 feet east of the prolongation of the sidewalk lines on the east side of Westwood. After the impact, the bus came to a stop within 6 or 8 feet. Plaintiff, dressed in dark clothing, had set out to cross Wilshire, going from the northeast corner south across the street along a line from 10 to 15 feet east of the sidewalk line. The street lights were somewhat obscured by holiday decorations; the bus had its headlights on, was lighted inside, and made quite a bit of noise. Plaintiff was hurrying as she left the curb to go south, slowed up about the middle of Wilshire, glanced to the right so that the approaching bus would have been within her line of vision and from 25 to 50 feet away, started to run south on the course as above described, and came in contact with the side of the front end of the left front fender, falling down by the side of the bus wheel.

Under the facts, especially in view of the provisions of section 131½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1931, p. 2127), it appears that the motion for nonsuit was properly granted.

Appellant suggests that the bus should have passed to the right of the exact center of the intersection. Section 129 of the California Vehicle Act (St. 1923, p. 558, as amended by St. 1929, p. 541), which makes such a requirement, excepts a case where other "turning markers" are provided, such as appear in this case as indicated by the diagram in evidence and some fragments of testimony. The course followed by the bus in making the turn, even if it were too gradual a curve, could not be said to have been a proximate cause of the accident.

[2] The doctrine of last clear chance is finally relied upon by appellant. This doc-

trine does not apply where both parties are contemporaneously and actively in fault down to the very moment of the injury, such fault proximately contributing to the collision, as in this case, and cannot be invoked in support of plaintiff's case. *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 491

RAFFERTY v. MITCHELL, Insurance
Com'r.
Civ. 8778.

District Court of Appeal, Second District,
Division 1, California.
Feb. 11, 1935.

1. Executors and administrators ⇨429

Distributee can maintain action to recover his distributive share of estate after decree of distribution is made by court (Probate Code, § 1021).

2. Limitation of actions ⇨172

Trustee, generally, can plead bar of statute of limitations, either to cestui que trust's action at law or proceeding for relief in equity.

3. Limitation of actions ⇨103(1)

Limitations statute begins to run against trustee who repudiates trust, since cause of action arises when repudiation takes place, and statute also commences to run if for any other reason cause of action arises, and it is only where cestui que trust has no cause of action that statute does not run.

4. Executors and administrators ⇨537(5)

Legatee's action commenced more than thirteen years after decree of partial distribution, and more than nine years after decree of final distribution, against executor's surety for distributive share of estate, held barred by limitations, since legatee's right to maintain action for distributive share of estate accrued when decree was made.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Ellen Rafferty, Reverend Mother Superior of the Little Sisters of the Poor, St. Patrick's House, Kilmainham, Dublin, Ire-

land, against E. Forrest Mitchell, Insurance Commissioner of the State of California, liquidator substituted for the National Surety Company. From a judgment dismissing plaintiff's action after defendant's demurrer was sustained without leave to amend, the plaintiff appeals.

Affirmed.

Cushing & Cushing, of San Francisco, and Horace S. Wilson, of Los Angeles, for appellant.

Frank L. Guereña, of San Francisco, for respondent.

EDMONDS, Justice pro tem.

Plaintiff brought an action against the National Surety Company, as surety on the bond of an executor, for a distributive share of the estate which he administered. She appeals from the judgment dismissing her action after defendant's demurrer was sustained without leave to amend.

The complaint alleges that the surety company executed the bond of Joseph A. Monahan, as executor of the estate of Patrick J. Hamilton, deceased. It appears that Hamilton died in 1916, and that a few days thereafter Monahan qualified and filed his bond in the usual form prescribed for such office. By the testator's will a legacy of \$4,000 was left to St. Patrick's Home for Aged Men and Women, Kilmainham, Dublin Ireland, which amount was distributed to it in 1918 by a decree of partial distribution. The complaint further alleges that in 1922 the executor filed his final account and petition reciting that all legacies set forth in the will had been paid with the exception of the one to the organization above named, and that this had not been paid for the reason that no institution then existed or had ever existed in the past under such name; and that in executing said will said testator intended to name Little Sisters of the Poor, St. Patrick's, Kilmainham, Dublin. Plaintiff then alleges that the court made its order settling the final account of said executor and making its decree of final distribution of the estate, but that it made no order or decree of any kind concerning the legacy to the institution referred to in the will as St. Patrick's Home for Aged Men and Women, Kilmainham, Dublin, after the decree of partial distribution.

The complaint further alleges that the bequest was never paid, and that the executor could not be found to make demand upon. The executor, however, has never been discharged.

This action was commenced more than thirteen years after the decree of partial distribution was made and entered, and more than nine years after the decree of final distribution. Defendant, among other grounds, contends that appellant's action is barred by the statute of limitations, and the correctness of the ruling of the trial court upon that one ground is the only proposition presented by the appeal. In the presentation of that point respondent has assumed that plaintiff and her constituents did have a right to the \$4,000 legacy named in the will at the time of entry of the decree of partial distribution in 1918.

Appellant admits that the action would be barred if only the length of time elapsing between the decree of partial distribution and the commencement of the action is to be considered, but contends that the executor is an express trustee, and that the statute does not run against his obligation to pay until he has repudiated the obligation and brought home notice of his repudiation to the distributee.

[1] By section 1021, Probate Code (formerly section 1666, Code of Civil Procedure), relative to decree of distribution, it is provided: "In its decree, the court must name the persons and the proportions or parts to which each is entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees." When such a decree has been made, the distributee may maintain an action to recover his distributive share. "While the court in probate may, through the medium of contempt proceedings, compel an executor or administrator to deliver to the distributee property distributed by its order or decree (*Ex parte Smith*, 53 Cal. 204; *In re Clary*, 112 Cal. 292, 44 P. 569; *Estate of Kennedy*, 129 Cal. 384, 387, 62 P. 64), section 1666, Code Civ. Proc., in terms authorizes distributees to 'demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession.' *Melone v. Davis*, 67 Cal. 279, 7 P. 703; *Wheeler v. Bolton*, 54 Cal. 302; *Le Mesnager v. Variel*, 144 Cal. 463, 77 P. 988, 103 Am. St. Rep. 91. Such an action against an executor or administrator is one against him individually, and not against him in his representative capacity. It is not an action against the estate. * * * " *St. Mary's Hospital v. Perry*, 152 Cal. 338, 340, 92 P. 864, 865.

[2-4] When a cause of action accrues, an action thereon can be commenced only within the period prescribed by the statute of limita-

tions. It is the accrual of the cause of action which starts the running of the statute, and where it arises in favor of a cestui que trust, the trustee may generally plead it in bar either to the action at law or in any proceeding for relief in equity. The general rule is that the statute does not begin to run against a trustee until he repudiates his trust. But by the repudiation of the trust a cause of action arises, and if it comes into being for any other reason the statute also commences to run. It is only where the beneficiary has no right of action that the statute does not run.

In 37 Corpus Juris, 906, the rule is thus stated: "Moreover it is not every case of direct and express trust arising between trustee and cestui que trust that is exempt from the operation of the statute. The only class of trusts not affected by the statute are, in the language of Chancellor Kent, 'those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction' of courts of equity. Therefore, whenever there is an adequate, concurrent remedy at law, the statute will apply, although relief is sought in equity; and the statute will run from the time the cause of action first accrues. This is in accordance with the general rule that the statute of limitations applies in equity whenever there is a concurrent remedy at law. A fortiori the rule exempting trusts from the operation of the statute applies only in courts of equity jurisdiction or to cases in which equitable relief is sought; it has no application to actions of assumpsit and the like, and is not recognized in courts of common law, unless in an exceptional case."

The quoted language of Chancellor Kent is from the case of *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417, where the application of the statute of limitations to obligations of fiduciaries is discussed at length. He there held, quoting an early English case, "that the trusts which are not within the statute, are those which are creatures of the court of equity and not within the cognizance of a court of law; and that as to those other trusts which are the ground of an action at law, the statute is, and in reason ought to be as much a bar in the one court as in the other." In the case of *Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 624, Chancellor Kent's language is quoted and followed; the court saying that his conclusions are founded on both reason and authority.

It is of interest in applying these rules to the case at bar, to find that the English case which was followed by Chancellor Kent and quoted from in *Love v. Watkins* was an action

for an account of the profits of an estate received while the plaintiff was an infant, and the bill was not filed until six years after he became of age. The court there said: "That where one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account, the statute of limitations was a bar to such suit, as it would be to an action of account at common law; for this receipt of the profits of an infant's estate was not such a trust as being a creature of a court of equity the statute shall be no bar to, for he might have had his action of account against him at law, and therefore no necessity to come into this court for the account. If the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court; and there is no sort of difference in reason between the two cases." Reference may also be made to *Smith v. Remington*, 42 Barb. (N. Y.) 75; *American Bible Society v. Hebard*, 51 Barb. (N. Y.) 552; *Webster v. American Bible Society*, 50 Ohio St. 1, 33 N. E. 297, 299; *Ganser v. Ganser*, 83 Minn. 199, 86 N. W. 18, 85 Am. St. Rep. 461; *Hargis v. Sewell's Administrator*, 87 Ky. 63, 7 S. W. 557; *Thornton v. Jackson*, 129 Ga. 700, 59 S. E. 905, in each of which a plea of the statute of limitations was upheld.

There seems to be no case in California where the question has been directly passed upon by an appellate court. Appellant, however, relies on two cases which it is contended are authority for the position taken. But each of them may be clearly distinguished from the case under consideration.

The case of *Estate of Clary*, 112 Cal. 292, 44 P. 569, 570, was one brought by an heir against an administrator. Plaintiff was a minor when the decree of distribution was made in her favor and did not bring her action for more than eight years after she reached her majority. While a recovery was allowed, the court pointed out that "the statute of limitations, even if available, was not pleaded." The court did not, therefore, pass upon the application of the statute.

In the case of *Elizalde v. Murphy*, 163 Cal. 681, 126 P. 978, 980, an administratrix who was also an heir brought an action against the personal representative of a previous administrator and the sureties upon his bond for an accounting. No decree of distribution had ever been made, and the court in upholding her right to maintain the action as against the plea of the statute of limitations said: "The discovery by the present administratrix, then but an heir, of such commingling, could

not, we say, have any bearing upon this litigation, for the reason that, if she knew of such conversion, she could not have instituted against Graves as administrator an action therefor. Her sole right under the circumstances would have been to call the trustee to an account, as here she has done. After the judgment in accounting in her favor, then for the first time arises the right to take appropriate proceedings against the administrator to enforce such judgment." The distinction there made by the court as to rights where an action may be maintained and before such right accrues is the determining factor in all cases of this character and the case on principle supports the views here expressed.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



4 Cal.App.2d 548

In re SMITH'S ESTATE.

SMITH v. BANK OF CALIFORNIA et al.
Civ. 9735.

District Court of Appeal, First District,
Division 2, California.

Feb. 14, 1935.

Hearing Denied by Supreme Court
April 15, 1935.

1. Appeal and error ⇐790(2)

Appeal from order sustaining demurrer to original petition held dismissible where, after such order was made, motion to file amended petition was granted, and amended petition was thereafter filed which superseded original petition.

2. Pleading ⇐214(3)

Demurrer to petition by alleged beneficiary of trust created for benefit of issue of trustor's son and his divorced wife admitted issue of fact that petitioner was one of issue of such son and divorced wife.

3. Trusts ⇐363

Probate court had jurisdiction of petition by alleged beneficiary of trust to determine that petitioner was one of three living issue of trustor's son and his divorced wife, who were made beneficiaries under terms of trust created by will, since statute pertaining to trusts created by will gives probate court jurisdiction over practically all controversies which might arise between trustees and those claiming to be beneficiaries (Probate Code, §§ 1120-1126, 1240).

4. Trusts Ⓒ367

Where, on petition by alleged beneficiary of trust seeking judgment determining that petitioner was one of three living issue of trustor's son and his divorced wife under terms of trust created by will, probate court ordered that notice of hearing should be given by posting, by mailing beneficiaries, and by serving trustees and also guardian of estate of two minor beneficiaries, and court's order was complied with, such notice *held* sufficient service of process, where Probate Code provided no specific method of notice (Probate Code, §§ 1120-1126, 1240; Code Civ. Proc. § 187).

5. Trusts Ⓒ371(1)

Petition by alleged beneficiary of trust created by will seeking judgment determining that petitioner was one of three living issue of trustor's son and his divorced wife, and to determine amount necessary for petitioner's support, maintenance, and education under terms of trust, *held* not demurrable.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Sidney V. Smith, deceased, wherein Elaine Grace Smith, by her guardian, Elaine Smith, filed a petition against the Bank of California and others. From orders sustaining demurrers to original and amended petitions, petitioner appeals.

Appeal from order sustaining demurrer to original petition dismissed, and order sustaining demurrer to amended petition reversed, with directions.

Treadwell, Laughlin & Treadwell, of San Francisco, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, for respondents.

Clarence A. Shuey, of San Francisco, for respondent Sidney V. Smith, Jr.

Brobeck, Phleger & Harrison, of San Francisco, for respondent American Trust Co., guardian of estates of Sidney V. Smith, IV, and Cora H. Butterworth Smith.

SPENCE, Justice.

Elaine Grace Smith, a minor, by her guardian Elaine Smith, appeals from an order entered in the above entitled proceeding on February 13, 1934, denying "Petition for Determination of Rights of Elaine Grace Smith in Trust, etc.," and also from an order entered in the above-entitled proceeding on March

24, 1934, denying "Amended Petition for Determination of Rights of Elaine Grace Smith in Trust, etc."

[1] After the first-mentioned order was made on February 13, 1934, sustaining the demurrer to the original petition and denying said petition, appellant made a motion for leave to file an amended petition, which motion was granted. The amended petition was thereafter filed, and as said amended petition superseded the original petition, we believe that the appeal from the order of February 13, 1934, should be dismissed. We shall therefore deal only with the amended petition and the propriety of the order sustaining the demurrer to and denying the amended petition.

The trust involved was created by the will of Sidney V. Smith, deceased, and in 1927 the estate of said deceased was distributed to respondents Bank of California, National Association, and Felix T. Smith, as trustees thereunder. The terms of said trust, so far as material here, were as follows: "Said trustees shall manage and control said property, collect the income thereof and apply the same so far as in their judgment they shall deem it necessary, to the support, maintenance and education of the issue of Sidney V. Smith, Jr., by Elaine T. Smith. During the lifetime of Sidney V. Smith, Jr., any of said income which in the judgment of said trustees is not necessary for the support, maintenance and education of said issue shall be applied so far as said trustees in their judgment may deem it necessary to the support and maintenance of Sidney V. Smith, Jr. Any balance of said income which in the judgment of said trustees shall not be necessary for any of said purposes shall be paid to said Sidney V. Smith, Jr." It was further provided that the trust should terminate and that the trust estate should be distributed per stirpes to the lawful issue of Sidney V. Smith, Jr., upon the death of the survivor of said Sidney V. Smith, Jr., and Elaine T. Smith. In 1933, said trustees filed their seventh account as such trustees. In their accounts said trustees stated that the beneficiaries of said trust were Sidney V. Smith, Jr., Sidney V. Smith, IV, and Cora Smith. No mention was made of appellant. After the filing of said seventh account, appellant instituted this proceeding for the determination of her rights.

In her amended petition appellant alleged, among other things, that said Elaine T. Smith and Sidney V. Smith, Jr., intermarried in 1917 and that the issue of said marriage were

Sidney V. Smith, IV, Cora Smith, and appellant Elaine Grace Smith. She further alleged that said Elaine T. Smith and Sidney V. Smith, Jr., were divorced in 1927 and that appellant had no income or means of support other than the sum of \$30 per month paid by her father, Sidney V. Smith, Jr., pursuant to the decree of the court in the divorce action. Other allegations were set forth in said amended petition relating to the trust estate, the income therefrom, and the amount of said income necessary for the support, maintenance, and education of appellant. It was then alleged that appellant had requested said trustees to pay a sufficient sum for said purposes, but that said trustees had failed and refused to do so, and had denied any right of appellant to the income of the trust or to the trust property. The following allegations were then set forth: "That the said trustees in all the matters herein set forth have acted in gross and arbitrary abuse of the discretion vested in them and in violation and disregard of the terms and provisions of said trust and of their duties and obligations as said trustees and have never at any time applied and are not now applying, and assert that they do not now intend to apply and will not in the future apply any part of the income of said trust to the support, maintenance or education of your petitioner, entirely irrespective of the necessity of such application and entirely irrespective of the judgment of said trustees as to the necessity of such application for said purposes, and the said trustees have not in any way exercised any judgment or discretion vested in them respecting the application of the said income of said trust to the support, maintenance or education of your petitioner, nor have they in any way sought to ascertain what part thereof is necessary therefor, but have stated that they have based their refusal to apply any part of the income of said trust property for the support, maintenance and education of your petitioner on the ground that your petitioner is not a beneficiary of the said trust and is not entitled under any circumstances to any part of the income of the said trust and is not entitled to any interest in the said trust property."

By the prayer of the amended petition, appellant sought a judgment determining that appellant was one of the three living issue of Stanley V. Smith, Jr., by Elaine T. Smith and a beneficiary under said trust, determining the amount necessary for appellant's support, maintenance, and education, determining that appellant would be entitled to a one-third interest in the trust property upon the ter-

mination of the trust, and for any other proper relief.

[2] It appears from the record before us and the briefs herein that the main issue of fact and perhaps the only issue of fact between the parties is whether appellant is one of the "issue of Sidney V. Smith, Jr., by Elaine T. Smith." But as the amended petition was denied by the court upon sustaining the demurrer thereto, we must treat this issue as admitted for the purposes of this discussion. The issues of law presented by said demurrer were: First, did the probate court have jurisdiction over the controversy; second, if the probate court did have jurisdiction, was the amended petition sufficient as against the general and special demurrer?

[3] The first of the above-mentioned issues of law is the main subject of the discussion in the briefs. It is respondents' contention in support of the order sustaining the demurrer and denying the amended petition that the probate court was "wholly without jurisdiction," while appellant contends that the probate court had jurisdiction under the provisions of sections 1120 to 1126 of the Probate Code. A review of these sections, and particularly of said section 1120, leads us to the conclusion that appellant's contention must be sustained.

Section 1120 of the Probate Code reads in part as follows: "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution, of settling the accounts and passing upon the acts of the trustee and for the other purposes hereinafter set forth."

The wording of said section 1120 is sufficiently broad in its scope to give the court jurisdiction over the present controversy. This section superseded section 1699 of the Code of Civil Procedure, which merely provided that the court should retain jurisdiction "for the purpose of the settlement of accounts under the trusts." But even under said section of the Code of Civil Procedure conferring jurisdiction in more limited terms, it was held that the court necessarily had jurisdiction for the purpose of determining the beneficiaries of the trust. *McAdoo v. Sayre*, 145 Cal. 344, 78 P. 874. We believe the language employed in the present section of the Probate Code was intended to broaden the

jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust. This view is strengthened by a consideration of section 1240 of the Probate Code, which provides for an appeal from an order settling an account of a trustee, from an order instructing a trustee, from an order "determining heirship or the persons to whom distribution should be made or trust property should pass," and from an order refusing to make any of said orders.

Respondents take the position that section 1120 of the Probate Code "only authorizes proceedings set in motion *by the trustee*" and that the only proceeding which may be set in motion in the probate court by one claiming to be a beneficiary is a proceeding under section 1121 of the Probate Code to compel the trustee to render an account. We find no such limitation in the language of the first portion of said section 1120 conferring jurisdiction upon the probate court. While the remaining portions of said section relate to certain proceedings to be instituted by the trustee and section 1121 relates to proceedings to be instituted by the beneficiary to compel the trustee to render an account, we do not believe that these provisions are to be construed as excluding other types of proceedings instituted by either the trustee or the beneficiary for purposes described in the first portion of said section 1120. Respondents claim that appellant's remedy is to institute a proceeding to compel the trustee to render an account, or to object to any account filed by the trustee, or "by bill in equity in a separate proceeding." We may assume that appellant might have pursued some or all of said remedies, but it does not follow that the probate court was without jurisdiction to hear and determine the petition filed by appellant here. As above indicated, we are of the opinion that the provisions of said section 1120 conferred such jurisdiction upon said court.

[4] It is suggested by respondents that even if the court had jurisdiction, "the service of process was nevertheless entirely lacking in necessary essentials." There being no specific method of service prescribed by the Code, the court ordered that notice of the hearing be given by posting, by mailing to the beneficiaries, and by serving the trustees and also the guardian of the estate of the two minor beneficiaries. The court's order was complied with and this was sufficient. Code Civ. Proc. § 187.

[5] Assuming that the court had jurisdiction, we have no doubt that the amended petition was sufficient against the general and special demurrer interposed. Respondents devote but one short paragraph of their brief to this subject and have not called our attention to any defect in the pleading. It is quite apparent that respondents rely wholly upon their claim that the court was without jurisdiction in support of the ruling sustaining the demurrer to and denying the amended petition. For the reasons above set forth, we believe that said demurrer should have been overruled and that the amended petition should not have been summarily denied.

The appeal from the order entered February 13, 1934, is dismissed. The order entered March 24, 1934, is reversed, with directions to the trial court to overrule the demurrer to the amended petition.

We concur: NOURSE, P. J.; STURTEVANT, J.



4 Cal.App.2d 577
HERMANC V. BLACKBURN.

Civ. 8079.

District Court of Appeal, Second District,
Division 1, California.

Feb. 14, 1935.

1. Malicious prosecution ☞21(2)

Attorney's advice, after full and fair disclosure of facts by defendant, that crime had been committed by plaintiff and that criminal prosecution would be justified, constitutes defense to action for malicious prosecution if in making such disclosure, and in instituting criminal proceedings, defendant acted in good faith.

2. Malicious prosecution ☞60(5)

In action for malicious prosecution for destroying adjoining landowner's wall during boundary dispute, evidence that every witness in prior boundary line action between parties testified that wall had been wholly built on plaintiff's lot and that defendant was in court throughout trial of boundary line action should have been admitted on issue of defendant's good faith in assuming contrary of such testimony and instituting criminal action for trespass against plaintiff.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Russell E. Hermance against John N. Blackburn. From a judgment of dismissal, plaintiff appeals.

Reversed.

Goodspeed, Pendell & McGuire, of Los Angeles, for appellant.

Richard H. Cantillon and Frank A. Sievers, both of Los Angeles, for respondent.

PER CURIAM.

No brief having been filed herein by respondent, the following statement of facts is taken verbatim from the brief filed by appellant (rule V, § 1):

"This action is one for malicious arrest and prosecution. The trial was before a jury. At the close of plaintiff's evidence, defendant made a motion for nonsuit which was granted, and thereupon a judgment of dismissal entered. Plaintiff appeals.

"Plaintiff and defendant are next door neighbors to one another. Defendant had built his home with an ornamental archway which extended therefrom over to and beyond the common boundary line between plaintiff and defendant. From this archway defendant built a small stone wall parallel to the boundary and extending to the street sidewalk. The encroachment of the arch and stone wall was about 1.85 feet. Plaintiff instituted a civil action to compel the removal of same. The trial court made findings in that action that the arch and stone wall did not encroach upon plaintiff's property. Plaintiff appealed from that judgment 'on the ground there was no evidence to sustain those findings and on said appeal the said judgment was reversed.' That action in the present action is referred to as the 'boundary line action.'

"Prior to the trial and decision of the 'boundary line action', plaintiff, in the early morning in the month of October, 1926, and while his automobile engine was running to deaden the sound of the blows of his hammer, broke up and removed the stone wall. Five months later the 'boundary line action' was tried in which the decision above mentioned was rendered, and which was subsequently reversed by the Supreme Court. 206 Cal. 653, 275 P. 783. When that decision had been rendered by the trial court, this defendant had two typewritten notices posted warning and threatening to arrest and prosecute any person for any trespassing on defendant's property. One of these notices was posted

in the front, and the other in the rear of the premises and within an inch of the boundary line which defendant claimed as 'represented by the southerly face of the stone wall as it had formerly existed', plaintiff's property being to the south of defendant's property. Plaintiff 'picked up said notices and (threw) them back' on to defendant's property. Thereupon defendant swore to and filed a criminal complaint against plaintiff on June 3, 1927, charging him with having destroyed said stone; that such criminal action was dismissed and on June 28, 1927, another criminal action was filed by defendant against plaintiff charging him with having maliciously torn up said stone wall and which was alleged to have been built upon defendant's property. On such charge plaintiff was arrested and tried, and a verdict of not guilty was returned by the jury. The present action has been brought to recover damages for such arrest and prosecution, which plaintiff alleges was done maliciously and without justifiable or probable cause."

On the trial of the instant action, under the provisions of section 2055 of the Code of Civil Procedure, plaintiff introduced defendant as a witness as for cross-examination. In the course of such examination, in substance, defendant testified that prior to the institution by him of the criminal action against this plaintiff he had fully and fairly stated all the facts not only to his own attorney, but as well to a deputy district attorney, and thereupon had been advised by each of such attorneys that he had probable cause for the institution against the plaintiff herein of the criminal action. By the reporter's transcript of the testimony received in the "boundary line action," plaintiff also offered to prove that three different surveys had been made respecting the location of the boundary line between the properties of the respective parties, and "that each and every witness who testified in said action as to any survey made by such witness, testified that the stone wall had been wholly built upon (plaintiff's) said lot"; also that by the testimony given by other witnesses in said action the fact would be established "that defendant was in court throughout the trial of the 'boundary line action' listening to the testimony."

An objection to the introduction of such evidence was sustained by the trial court, and such ruling is assigned by appellant as one of the reasons why the judgment herein should be reversed.

[1, 2] In an action for the recovery of damages arising from a malicious criminal pros-

ecution, although generally speaking the established fact that before the alleged prosecution was commenced, but after a full and fair disclosure had been made to an attorney at law of all the facts within the knowledge of a person who later was made a defendant in an action for such alleged malicious prosecution, the said attorney had advised such defendant that a crime had been committed by the person who subsequently became the plaintiff in the malicious prosecution action and that a criminal prosecution of such person would be justified, constitutes a defense to an action for the recovery of damages subsequently brought for malicious prosecution of such criminal action, such rule is distinctly qualified by the requirement that in making such disclosure of the facts, as well as in instituting such criminal proceedings, the person who became the defendant in the malicious prosecution action must have acted in good faith. 16 Cal. Jur. 741, and authorities there cited. And in the instant case, although the testimony given by defendant may have tended to establish the existence of the fact that before causing the criminal proceedings to be instituted against plaintiff he had acted on the advice of counsel, his defense may have been incomplete in that it lacked proof of the essential element of good faith either in his statement of assumed facts to his counsel, or in instituting such criminal proceedings. It is obvious that in making such a statement of pertinent facts and circumstances relative to the advisability of instituting a criminal action against one who might be suspected of having violated the provisions of some penal statute, the narrator might relate facts that by outward appearances were true, but which, to the positive knowledge of the narrator, were either wholly untrue, or were subject to much modification. Therefore, in the instant case, on the issue of good faith, any fact would have been admissible in evidence that would have tended to show that, notwithstanding a pretended full and fair disclosure by defendant to his attorney of the apparent facts that were present in connection with the commission of the alleged criminal offense, nevertheless defendant actually knew, or at least was in a fair position to ascertain (and which he had consciously failed to do), that the information which he gave to his attorney relative to the assumed facts was actually untrue in some essential particulars. And so, by the record in the "boundary line action" plaintiff herein could have established the facts that throughout the trial of such ac-

tion the defendant therein (and defendant herein) was present and heard the entire testimony that was given by each of the several surveyors to the effect that the archway and the stone wall constructed by defendant encroached upon the property of plaintiff, the good faith of defendant in assuming to the contrary of such testimony and in instituting against plaintiff a criminal action for trespass, wherein he was charged with "having maliciously torn up said stone wall," would very properly be called in question. Had such evidence been admitted, the motion for nonsuit interposed by defendant might not have been granted. It follows that the error of the trial court in rejecting the offered evidence was prejudicial to the substantial rights of plaintiff.

The judgment is reversed.



4 Cal.App.2d 690

PEOPLE v. RICHARDS.

Cr. 2633.

District Court of Appeal, Second District,
Division 2, California.

Feb. 21, 1935.

Homicide ☞ 254

Evidence sustained conviction of murder in second degree (Pen. Code, § 188).

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Jasper D. Richards was convicted of murder in the second degree, and he appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted of murder in the second degree, and appeals from such judgment and an order denying motion for new trial.

Deceased, one Esmay, and defendant occupied cabins on the opposite sides of a bungalow court. On the day of the shooting, de-

defendant purchased a rifle and sixteen or seventeen cartridges and took them to his home. About 5 o'clock, while still daylight, deceased was standing at a stove in his cabin preparing food, when he was struck by a rifle bullet which killed him. The shot was heard and a puff of smoke was seen near defendant's doorway. On entering defendant's cabin, police found him there, together with the rifle, sixteen good cartridges, and an empty shell. A ballistic expert testified that a hole in defendant's screen door was apparently caused by a bullet going out, and there were some grains of unburned powder on the inside near the hole similar to that found in the cartridges in defendant's cabin, that a hole was found in the window of deceased's cabin opposite defendant's door, apparently made by a bullet going in, and that the bullet found in the wall on the far side of the cabin of deceased and the empty shell showed they had been used in defendant's rifle.

Defendant, a man of about 60 years of age, told the police that deceased had abused him with insulting words, and the night previous to the shooting had cursed defendant practically all night. He said he expected to go on a prospecting trip, and had purchased the rifle for that reason. He denied firing any shot.

The evidence supports the verdict. Malice must be implied from all the circumstances. Pen. Code, § 188.

Certain instructions are referred to as "being argumentative and not instructions," but a careful examination shows that they are merely statements of law based upon the Code or expressly approved by our courts.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 637

SALAZAR v. STEELMAN.
Civ. 8814.

District Court of Appeal, Second District,
Division 1, California.
Feb. 18, 1935.

Hearing Denied by Supreme Court
April 18, 1935.

I. Mortgages ⇨218

Independent action on note secured by trust deed held not maintainable, where com-

plaint contained no allegations and there was no evidence upon which findings could be made, and no findings made, that security was exhausted or had become valueless, and record failed to show waiver of security.

2. Mortgages ⇨218

In action on note secured by trust deed, answer which alleged separate defense, purpose of which was not to plead deed and its effect, but which did plead contemporaneous execution of deed with note and as security therefor, held to plead enough facts to make good defense predicated on theory of security alone.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Dolores Salazar against Samuel Steelman. From an adverse judgment, defendant appeals.

Reversed.

Wm. B. Ogden, of Los Angeles, for appellant.

Roger Marchetti, of Los Angeles (A. V. Falcone, of Los Angeles, of counsel), for respondent.

ROTH, Justice pro tem.

In this case suit was brought on a promissory note. The note pleaded in *hæc verba* recites that it is secured by a deed of trust. The answer pleaded, the evidence in the case showed, and the court found, that it was in fact so secured. There are no allegations in the complaint, nor was there any evidence upon which findings could be made, and there are no findings that the security was exhausted or had become valueless, or that the trust deed or note contained any covenants giving to the plaintiff, respondent here, the right to bring an independent action on the note. There is nothing in the pleadings or in the record on appeal which indicates that the respondent waived her security; neither can the action be deemed an attempt to foreclose the trust deed by judicial sale.

[1] At the time the case was being tried, the law, as ultimately enunciated in *Bank of Italy, etc., Ass'n v. Bentley*, 217 Cal. 644, 20 P.(2d) 940, was in the throes of delivery. As finally decided, that case holds that an independent action cannot be brought on a promissory note secured by a trust deed, when the facts are as detailed above.

[2] The answer alleged a separate defense, the purpose of which, it is true, was not to

plead the trust deed and its effect. This separate defense, however, does plead the execution of the trust deed and alleges the fact that it was executed contemporaneously with the execution of the promissory note and as security therefor. The court made a finding that this was a fact. Whatever the purpose of the separate defense, it pleaded enough facts to make a good defense predicated on the theory of security alone. It is apparent, therefore, that the doctrine of *Kempton v. Appellate Division of the Superior Court* (Cal. App.) 39 P.(2d) 846, does not apply, and that the complaint upon its face and the facts show that the action was prematurely brought.

The judgment must be, and it is hereby, reversed.

We concur: CONREY, P. J.; YORK, J.



4 Cal.App.2d 663

WILLER v. QUINN, Chief of Police, et al.
Civ. 9472.

District Court of Appeal, First District,
Division 2, California.
Feb. 20, 1935.

Hearing Denied by Supreme Court
April 18, 1935.

1. Constitutional law ⇨80(2)

Resolution of police commission of San Francisco empowering police department to award possession of property allegedly stolen and found in possession of pawnbrokers or secondhand or junk dealers, and to revoke permits of persons refusing to obey award, held proper exercise of legislative functions of such commission (St. 1931, pp. 2991, 2997, 3001, §§ 24, 35, 39).

2. Licenses ⇨38

Whether police commission of San Francisco exceeded its power in adopting resolution providing for summary award of possession of property allegedly stolen and found in possession of pawnbrokers or secondhand or junk dealers, and to revoke permits of persons refusing to obey award, could not be inquired into on a writ of review (St. 1931, pp. 2991, 2997, 3001, §§ 24, 35, 39).

3. Municipal corporations ⇨120

Resolution of police commission may not be construed by picking out only some of the words contained therein, but resolution must be read as a whole and effect given, if pos-

sible, to every word (Code Civ. Proc. §§ 1858, 1859).

4. Municipal corporations ⇨63(1)

Presumption is that police commission in passing resolution to govern its members in enforcing the police powers acted within the law (Code Civ. Proc. § 1963, subd. 15).

5. Constitutional law ⇨309(1)

Resolution of police commission of San Francisco empowering police department to award possession of property allegedly stolen and found in possession of pawnbrokers or secondhand or junk dealers, and to revoke permits of persons refusing to obey award, held not unconstitutional as empowering police commission to determine title to such property without notice to claimant (St. 1931, pp. 2991, 2997, 3001, §§ 24, 35, 39).

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Application by Philip Willer for a writ of review to review an order of William J. Quinn, as Chief of Police of the City and County of San Francisco, and Theodore J. Roche and others, as members of the Police Commission of the City and County of San Francisco, revoking petitioner's permit to conduct a secondhand business. From a judgment for respondents, petitioner appeals.

Affirmed.

Morris Oppenheim and Leo R. Friedman, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Sylvain Dewey Leipsic, Deputy City Atty., both of San Francisco, for respondents.

STURTEVANT, Justice.

The petitioner applied to the trial court for a writ of review. The respondents appeared and filed a general demurrer. The trial court sustained the demurrer without leave to amend. From the judgment entered, the petitioner has appealed.

The material facts alleged in the petition include the following: The petitioner is and for some years has been engaged in conducting a secondhand store in which he buys and sells secondhand wearing apparel. He obtained a permit from the police commission of San Francisco to conduct said business, and a license was issued to him by the tax collector. The respondent William J. Quinn is chief of police and Theodore J. Roche, Thomas E. Shumate, and Frank J. Foran constitute

the police commission of San Francisco. James C. Malloy is a lieutenant of police and George Stallard is an inspector. On September 9, 1933, petitioner purchased from V. Booth one suit of clothes and one leather jacket and paid therefor \$7. At the time of the purchase " * * * petitioner believed that the said V. Booth was the owner of and entitled to sell said property." On January 26, 1914, the police commission adopted a resolution as follows:

"Resolved, that in all cases where a claim is made to property pawned with or sold to a Pawnbroker, Second Hand Dealer or Junk Dealer by a person claiming to be the owner thereof and asserting that the property was stolen, the validity of such claim shall be determined by the Chief of Police, or such other member of this department as shall be hereafter designated by this board. In the event said Chief or such other designated member shall determine that such property was stolen and that the claimant is the true owner thereof and that no collusion exists between such owner and the person or persons by whom such property was stolen, he shall direct that such stolen property be returned to the said owner without compensation of any kind being paid therefor. In the event such direction shall be refused, the permit under which such pawnbroker, second hand dealer or junk dealer is permitted to conduct his said business shall be subject to revocation;

"Further resolved, that no member of this department shall advise the payment by such owner of any compensation to such pawnbroker, second hand dealer or junk dealer for the return to him of any property claimed to have been stolen."

On September 15, 1933, James C. Malloy and George Stallard directed the petitioner to turn over said property, without any compensation therefor, to Mr. and Mrs. Harold Winters, who then and there claimed to be the lawful owners, but petitioner refused to do so. On September 18, 1933, James C. Malloy filed with the police commission a formal complaint against the petitioner asking a revocation of petitioner's permit to conduct said business. The complaint so placed before the police commission was a formal statement of the facts showing a violation of said resolution by the petitioner. Upon the filing of the complaint the police commission issued a citation to the petitioner and in conformity therewith a hearing was had and the police commission entered an order revoking the permit of the petitioner to conduct a secondhand business. Thereafter petitioner appealed to

the board of permit appeals and after a hearing had the latter board affirmed the order of the police commission. No attack is made on the judgment of the board of permit appeals, and the members of that board are not parties to this proceeding. The contention made by the petitioner is: "That respondents above named were and each of them was without jurisdiction or authority to adopt or enact said resolution or to issue said citation, or to hear and determine the alleged charges set forth in said complaint so filed, as aforesaid, or to make the order revoking the permit of petitioner. * * *"

Before 1932 the power to collect all licenses which might be required by law or ordinances within San Francisco was vested in the tax collector. St. 1899, p. 274, Art. 4, c. 5, § 2. The power to issue permits was vested in the police commission. St. 1899, p. 329, Art. 8, c. 4, § 7. The chief of police was the executive officer of the police department. The power to revoke a permit was not vested in any officer or board, but was governed by the general laws. In 1932 the present charter went into effect (St. 1931, p. 2973). It is not divided into articles and chapters, but merely by sections. It is provided in section 24 (St. 1931, p. 2991) that the board of supervisors may enact ordinances regulating the issuance of licenses and permits for the operation of business or privileges which affect crime, and that the chief of police shall have the power to inspect the premises of secondhand dealers. Section 35 (St. 1931, p. 2997) provides that the chief of police may refuse to issue a permit or may revoke it, if already issued, as soon as it appears that the business is conducted in an "improper manner." Section 39 (St. 1931, p. 3001) provides that if a permit is revoked the permittee may appeal to the board of permit appeals which, after a full hearing, can concur in the act of revocation or restore the permit. It is not claimed the board of supervisors has enacted an unreasonable ordinance nor that the power to revoke in a proper case does not rest with the chief of police. But, as will presently appear, the attack is addressed solely to the resolution hereinabove set forth and to acts alleged to have been done under and pursuant to said resolution.

[1, 2] The first point involved is whether the petitioner has adopted the proper remedy. That point must be divided. He contends the police commission exceeded its jurisdiction in passing the resolution. But he is mistaken. In adopting said resolution the police commission was exercising legislative functions and was not exercising judicial

functions, and such acts may not be inquired into in this proceeding. *Wulzen v. Board of Supervisors*, 101 Cal. 15, 24, 35 P. 353, 40 Am. St. Rep. 17; *Spring Valley Water Works v. Bryant*, 52 Cal. 132, 139. It is also contended that the police commission did not have jurisdiction to hear the complaint filed with the commission, to issue the citation, nor to make the order revoking petitioner's permit, because the above-quoted resolution was unconstitutional. As will appear below, we think the resolution was not unconstitutional or void.

[3-5] In his next point the petitioner claims his constitutional rights have been infringed. This point he predicates upon the contention that the said resolution purports to confer the power on the police commission to hear and determine the title to certain personal property, without notice to the claimants. The point may not be sustained. It will be conceded that the wording of the resolution is such that the petitioner's argument has some plausibility if one picks out merely some of the words contained in the resolution. But that method of construing a written instrument is never permissible. In so far as the police commission attempted to provide a rule to govern its members in enforcing the police powers it will be presumed it acted within the law. Code Civ. Proc. § 1963, subd. 15. The entire resolution will be read as a whole, and force and effect will be given to every word if possible. Code Civ. Proc. §§ 1858 and 1859. As so read it is clear that said resolution does not purport to confer the power to adjudicate title. In the petition it is not claimed that the police commission or any other tribunal or officer has attempted to adjudicate title to the personal property involved. When one, claiming to be the owner of property in the possession of a secondhand dealer, asserts his ownership and states that it has been stolen from him, the resolution under attack prescribes a procedure which, if followed, will tend to preserve peace and order, and will relegate the contending parties to the courts to try the title to the property and will place the burden where it belongs, to wit, on him who asserts a claim thereto as against the person who makes a bona fide claim to clear title but asserts that the property was stolen from him. If, in any jurisdiction, a peace officer finds two persons engaged in a fist fight, his first duty is to stop the fight. If it transpires they were fighting over the title to personal property, he makes certain inquiries and thereupon he turns the property over to

the apparent owner and directs the other party, if he is dissatisfied, to go into court and obtain a judgment determining the title. The resolution or rule complained of was but a formal direction enforcing just that procedure; no more, no less. Moreover, the petitioner has been awarded more consideration than under the law he was entitled to. When officers Malloy and Stallard made their report to the chief of police, the latter had the clear right under the provisions of section 35, *supra*, to revoke the permit held by the petitioner who, under section 39, had the right to appeal to the board of permit appeals. If he lost his appeal he was bound to show in an application for a writ of review that the latter board had exceeded its jurisdiction or he could not prevail. He had no right of appeal to any court because the charter does not so provide. If he was successful in his appeal, the board of permit appeals had the power to restore his permit (section 39, *supra*), and he was not bound to go to the police commission because the charter does not so provide.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



4 Cal.App.2d 534

**SHAW v. IMPERIAL MUT. LIFE &
BENEFIT ASS'N et al.**

**SAME v. IMPERIAL MUT. LIFE INS.
ASS'N.
Civ. 9211.**

District Court of Appeal, Second District,
Division 2, California.

Feb. 13, 1935.

Rehearing Denied March 15, 1935.

1. Insurance ☞646(3)

Presumption existed that insured did not commit fraud when he procured reinstatement of his life certificate.

2. Insurance ☞646(3)

Burden of affirmatively proving falsity of representations made by insured in procuring reinstatement of life certificate devolved on insurer.

3. Fraud ☞58(1)

To establish fraud, evidence must be clear and satisfactory.

4. Insurance Ⓒ256(2), 668(6)

Untrue statement, to avoid policy, must have been knowingly and intentionally made with intention of defrauding insurer, and whether false statement was so made is fact question.

5. Insurance Ⓒ365(2)

False statements in reinstatement application, to avoid life policy, must be shown to have been willfully false.

6. Appeal and error Ⓒ544(2)

On appeal on judgment roll alone, reviewing court's inquiry is limited to question of correctness of conclusions of law.

7. Insurance Ⓒ518

Under mutual life policy providing for \$3,000 benefit conditional on existence of certain number of \$3,000 or \$1,500 policies, beneficiary was not entitled to \$3,000 benefit, notwithstanding lack of required number of policies in force, where insurer amended by-laws and issued policies in other denominations, and thereafter levied death assessments on all members irrespective of amount of their policies (Civ. Code, §§ 452a, 453).

8. Appeal and error Ⓒ544(2)

On appeal based on judgment roll alone, reviewing court is limited to consideration of facts admitted by pleadings and embraced in findings of fact.

9. Insurance Ⓒ518

Beneficiary was not entitled to recover \$3,000 benefit under mutual life policy despite lack of number of \$1,500 or \$3,000 policies in force on which payment of such amount was conditioned because of amendment of by-laws subsequent to issuance of original policy providing for issuance of policies in other denominations, where policy as subsequently reinstated provided that member should abide by by-laws then in force, since amended by-laws entered into, and must be considered as part of, contract (Civ. Code, §§ 452a, 453).

10. Costs Ⓒ3

Right to recover costs exists solely by statute.

11. Costs Ⓒ18

Plaintiff, recovering judgment at law for \$1,533 on mutual life policy in superior court was not entitled to recover costs, since judgment could have been rendered by municipal or inferior court within county (Code Civ. Proc. §§ 1022, 1025).

Action by Minnie Shaw against the Imperial Mutual Life & Benefit Association, the Imperial Mutual Life Insurance Association, and another. From a judgment, plaintiff and second-named defendant appeal, and, from an order made after judgment striking her cost bill, plaintiff appeals.

Affirmed.

Charles R. Thompson, of Los Angeles, for appellant-respondent Imperial Mut. Life Ins. Ass'n.

W. H. Douglass, of Los Angeles, for appellant-respondent Minnie Shaw.

WILLIS, Justice pro tem.

The record herein includes three appeals. To avoid confusion, the parties will be denominated as "plaintiff" and "defendant," and the appeals will be considered in the following order: (1) Appeal by defendant from a judgment entered on findings of fact and conclusions of law in favor of plaintiff for the sum of \$1,533 on an insurance policy issued to one James Manning, father of plaintiff; (2) appeal by plaintiff from the same judgment; (3) appeal by plaintiff from an order made after judgment striking her cost bill.

Appeal No. 1.

The defendant is a mutual life and benefit association organized and operating under the provisions of the Civil Code relating thereto (sections 452a to 453, inc.). On March 29, 1930, defendant issued to James Manning its certificate of membership. For failure to pay the net semiannual premium the member was suspended, but on October 7, 1930, on the written application of Manning, his membership was reinstated. Thereafter he paid all premiums and assessments and dues required until his death, which occurred on September 17, 1931. In his application for reinstatement Manning represented that he had "not consulted a doctor during the past twelve months" and that he had "had no illness of any kind during the past twelve months." In its amended answer defendant alleged that these representations were false, and made with intent to defraud defendant and to induce defendant to reinstate said certificate. After a trial of the issue joined on this affirmative defense, the court found that it was "not true that decedent in his application for reinstatement dated October 7, 1930, made false and fraudulent statements for the purpose of inducing the defendant to

Appeal from Superior Court, Los Angeles County; J. J. Trabucco and Lester W. Roth, Judges.

reinstate said policy as is alleged in the defendant's answer as a defense to this action."

[1-5] The law presumes that decedent did not commit fraud when he procured the reinstatement of his certificate. *Everett v. Ins. Co.*, 45 Cal. App. 332, 187 P. 996. The burden of affirmatively proving the falsity of the representations made by decedent devolved upon defendant, and to establish fraud the evidence must be clear and satisfactory. *Hannon v. Madden*, 214 Cal. 251, 5 P.(2d) 4; *Travelers' Ins. Co. v. Byers*, 123 Cal. App. 473, 11 P.(2d) 444. The rule is well established that an untrue statement, in order to avoid an insurance policy, must have been knowingly and intentionally made with the intention of defrauding the insurer; and whether a false statement was so made is a question of fact for the jury or trial court. *Pedrotti v. Insurance Co.*, 90 Cal. App. 668, 266 P. 376. In the light of these rules we have examined the evidence touching the question of fraud, as it is here presented by the reporter's transcript, and find therein nothing to show that decedent had any knowledge of any "illness" during the preceding year or that the statements of decedent in his reinstatement application were willfully false, as is required to sustain a defense based on the ground of fraud in an action upon the policy issued thereon. *Travelers' Ins. Co. v. Byers*, supra. The finding of the trial court on that issue is supported by the evidence and is conclusive on this court.

Appeal No. 2.

[8] On this appeal plaintiff contends that under the facts and the law she was entitled to a judgment for \$3,000 instead of the lesser amount found and adjudged. As the appeal is on the judgment roll alone, our inquiry is limited to the question of the correctness of the conclusions of law.

The findings, together with admissions in the pleadings, show that on March 29, 1930, defendant issued its membership certificate to James Manning, wherein it agreed to pay plaintiff, as beneficiary, the sum of \$3,000 upon receipt of proof of death of said member, provided, however, if death occurred within six months from date of certificate, the amount payable shall not exceed \$1,000, and, should death occur after six months from date of certificate, the amount payable shall not exceed \$2,000; and, if death occur over twelve months after date of certificate, the full sum of \$3,000 shall be paid, provided, however, that said amount is conditional that there be at least 1,500 \$3,000 policies, or

3,000 \$1,500 policies in good standing at the time of death of said member, or \$3,000 in the mortuary fund; if a less number of the policies above described be in good standing, or there be less than \$3,000 in the mortuary fund, then the amount payable under such certificate shall be \$2 for each \$3,000 policy member, and \$1 for each \$1,500 policy member, all in good standing; but in no event shall the amount exceed \$3,000. At the date of issuance of the original certificate on March 29, 1930, the defendant association issued policies in denominations only of \$1,500 and \$3,000, but, after June 28, 1930, when certain amendments were made to its by-laws, the association issued policies of denominations of \$1,000 and \$2,000, in addition to those of \$1,500 and \$3,000. Assessments were thereafter levied on all members irrespective of the amount of their policies, upon the death of any member. At the date of death of decedent there were in force 2,753 policies, of which 629 were \$3,000 policies and 275 were \$1,500 policies; the remainder being of denominations other than these. At the date of such death there was in the mortuary fund only \$629. The court then found that \$2 for each of the 629 \$3,000 policies produced the sum of \$1,258, and that \$1 for each of the 275 \$1,500 policies produced the sum of \$275, and that the total of said sums equalled \$1,533, for which amount it concluded plaintiff was entitled to judgment.

The by-laws in force at the date of the original certificate and the by-laws as amended in the interim between that date and the date of reinstatement are set forth in the findings. Plaintiff contends that by such amended by-laws defendant was allowed to write policies in denominations other than \$1,500 and \$3,000, which had the effect of classifying its old members with \$1,500 and \$3,000 policies so as to exclude their policies from the benefits of assessments collected on the new policies written under the amended by-laws in other amounts. We find nothing in the by-laws as found and stated in the findings which refers to or limits the writing of policies in any specific amount. The court found that at the date of issuance of the original certificate to decedent defendant issued policies in denominations of \$1,500 and \$3,000, and that, after the amendment of the by-laws, it issued policies in other denominations, such as policies for \$1,000 and \$2,000, and that thereafter, upon death of any member, assessments were levied on all members and policyholders, irrespective of the amount of their policies. Such action or method of conducting its business did not have the effect

of classifying the old members, although it might have the effect of reducing the total of \$1,500 and \$3,000 policies in force at a given date thereafter. Under section 452a of the Civil Code, defendant was authorized to pay to the nominee of any member a sum not exceeding \$3,000, and by section 453 it was provided that on the death of a member an assessment on the surviving members not exceeding \$3 for each member may be levied and collected and with its proceeds pay the benefits provided in the contract issued to the deceased member. The contract as found by the court specifically provides the method of determining the amount of benefit to be so paid, and the findings show all the facts essential upon which to compute such amount. The conclusion of the court is in accordance with those findings.

[7-9] In addition, we may say that upon this appeal, based on the judgment roll alone, we are limited in our consideration of facts to those admitted by the pleadings and embraced in the findings of fact. Nowhere therein does there appear any facts which would support the claim of plaintiff that the beneficiary under the policy in question was deprived of any benefit provided for in the contract and by-laws. The amended by-laws were in force at the date of reinstatement, and became a part of the contract when it was renewed by reinstatement on October 7, 1930; and, even if such amendment had the effect of allowing defendant to issue policies in denominations other than \$1,500 and \$3,000, it would be binding on the insured and would become part of the contract of insurance. The policy as reinstated after this amendment of the by-laws provided that the member shall abide by the by-laws then in force. Such by-laws therefore enter into, and must be considered as a part of, the contract. *O'Connor v. Grand Lodge A. O. U. W.*, 146 Cal. 484, 80 P. 688. Under the contract and the by-laws and the other facts shown herein by the judgment roll, we conclude that there was no error in the court's conclusion and that the judgment entered is fully supported.

Appeal No. 3.

[10, 11] This appeal is based upon the judgment roll and the clerk's transcript of proceedings on the motion to strike the cost bill, and involves the question of correctness of the court's order to strike plaintiff's cost bill. The right to recover costs exists solely by virtue of statute. The action brought by plaintiff herein was an action at law for money.

Neither the allegations nor the prayer in her complaint constitute basis for any relief in equity. The judgment entered was one which could have been rendered by a municipal or inferior court within the county, and plaintiff was therefore not entitled to recover costs by reason of the plain language of sections 1022 and 1025 of the Code of Civil Procedure as they existed at the date of judgment.

Other points argued on this appeal are without merit.

The judgment and order are, and each of them is, affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 516

LOS ANGELES COUNTY v. FARNS-
WORTH et al.
Civ. 8852.

District Court of Appeal, Second District,
Division 1, California.
Feb. 13, 1935.

Rehearing Denied March 6, 1935.

Hearing Denied by Supreme Court
April 11, 1935.

1. Evidence ⇨419(13)

Extrinsic evidence of existence of consideration for contract with county whereby purchaser of interest in subdivision property agreed to make improvements *held* admissible, where purchaser's contract, given in lieu of similar agreement of his vendor, merely recited as consideration that board of supervisors had accepted dedication of highways (Code Civ. Proc. § 1962, subd. 2).

2. Evidence ⇨443(3)

Evidence that purchaser of interest in subdivision orally agreed with his vendor, at time of their exchange of properties, to assume vendor's contract with county to do improvement work *held* admissible, in county's action on bond given to secure purchaser's performance, to show that purchaser's contract with county to make improvements, which recited no consideration other than county's past acceptance of dedication, was supported by consideration (Code Civ. Proc. § 1962, subd. 2; Civ. Code, § 1605).

3. Contracts ⇨66

Contract whereby purchaser of interest in subdivision agreed with county, after county had accepted dedication, to make certain improvements which vendor had contracted to make *held* not without considera-

tion where purchaser agreed with his vendor, at time of exchange of properties, to assume vendor's obligation (Civ. Code, § 1605).

4. Contracts ⇨66

Contract whereby one purchasing interest in subdivision agreed with county to make improvements therein, pursuant to purchaser's assumption of vendor's obligation to do improvement work, *held* supported by consideration notwithstanding fact that county had already accepted dedication, where time allowed purchaser for completion of improvement work was extended beyond period allowed vendor (Civ. Code, § 1605).

5. Evidence ⇨357

Letter of road commissioner to board of supervisors showing that bond and contract of purchaser of interest in subdivision were accepted in lieu of bond and contract of his vendor to make improvements *held* inadmissible in county's action against purchaser and his surety where there was no evidence that they consented to substitution.

6. Contracts ⇨88, 334

Consideration for contract is presumed and need not be alleged.

7. Contracts ⇨88, 346(3)

Recital of insufficient consideration in complaint on contract permits proof of valid consideration, and presumption of consideration still obtains.

HOUSER, Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Los Angeles County against Joseph Farnsworth and others. From an adverse judgment, plaintiff appeals.

Reversed.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for appellant.

Hindman & Davis and Angus C. McBain, all of Los Angeles, for respondent Metropolitan Casualty Ins. Co.

SHINN, Justice pro tem.

This is an action against the principal and surety on a bond given to the county of Los Angeles for the faithful performance of a contract to cause certain public improvements to be made for the benefit of a subdivided tract of land. The trial court held the contract, and therefore the bond, to be without

consideration. Plaintiff appeals from a judgment in favor of defendant.

The land was subdivided by Peterson, Farnsworth, and Glessman, title standing in the name of a trustee. When their subdivision map was submitted to the board of supervisors for approval on or about April 30, 1924, the subdividers named entered into a contract with the county by which they obligated themselves as contractors to install within one year from date certain public improvements in the tract. The pertinent provisions of this contract read as follows: "Witnesseth: First: That the Contractor, for and in consideration of the acceptance by the Board of Supervisors of the highways offered for dedication in that certain tract known as Compton Ave. Palms, Tract No. 7874 (sheets 1-2) hereby agrees, at his (its) own cost and expense, to furnish all tools, equipment, labor and material necessary to perform and complete, and within 12 months from the date hereof to complete in a good and workmanlike manner the improvement of the following streets: Compton Ave., Jeton Street, Palm Street, Regina Street, Ingram Ave. and Peterson Ave. in said tract, according to plans and profiles filed in the office of the Road Department and to do all work incidental thereto according to the specifications which are attached to and are hereby made a part of this contract."

The contractors Peterson, Farnsworth, and Glessman gave a performance bond with a corporate surety in the sum of \$8,408.86, being one-fourth of the estimated cost of the improvements. This contract and bond were dated April 30, 1924, and were delivered to and filed with the board on that date. On May 26, 1924, the board duly accepted for public use the streets, avenues, and alleys offered for dedication as shown on the map, and the map was thereupon duly recorded in the office of the county recorder. The board subsequently extended the time for the completion of the work until April 30, 1926.

On December 2, 1925, Farnsworth exchanged his interest in the property with one Mitchell, receiving therefor a ranch in Fresno county. Mitchell entered into a contract with the county on December 15, 1925, by which he agreed to install the improvements in the tract, and gave bond for faithful performance in the same amount as was stipulated in the previous bond, the defendant-respondent Metropolitan Casualty Insurance Company of New York becoming surety on this bond. The provisions of the Mitchell contract differed

In no material respect from the Farnsworth contract, stating "that the contractor having in consideration of the acceptance by the board of supervisors of the highways offered for dedication in that certain tract [referring to tract 7874] hereby agrees," etc., with a single exception, namely, the time for completion of the Mitchell contract was December 15, 1926. It will be noted that the time would have expired under the extension of the Farnsworth contract on April 30, 1926.

Plaintiff, by its amended complaint, alleged the execution of both contracts and bonds and sought recovery only against defendants Mitchell and Metropolitan Company. Mitchell having died before the trial, the case was tried against the Metropolitan Company alone. The answer of this defendant pleaded, among other defenses, want of consideration for the contract between Mitchell and the board of supervisors. The basis of this claim is that the only consideration stated in the contract is the acceptance by the board of the highways shown on the map; that they had long before been accepted under the Farnsworth contract; that there remained nothing for the board to do, and therefore the agreement was unilateral and without consideration. It is not to be questioned that the contract and bond fail unless they are supported by some consideration other than the one recited.

Upon the trial the court received evidence, subject to objection of defendant, of an oral agreement between Farnsworth and Mitchell, made at the time of the exchange of properties, to the effect that Mitchell would undertake the obligation of completing the installation of the public improvements which Farnsworth was then under contract to do. Evidence was likewise received of a communication of the county road commissioner to the board, dated December 17, 1925, purporting to submit Mitchell's agreement and bond as a substitute for those of Farnsworth, and reading in part: "I beg to advise that the property has changed hands and the new subdivider wishes to exchange the old bond for new." Minutes of the board of supervisors were received in evidence, subject to defendant's objection, reading as follows: "Office of the Board of Supervisors of the County of Los Angeles, State of California, Monday, December 21st, 1925. The Board met in regular session. Present, Supervisors R. F. McClellan, Chairman presiding, Prescott F. Cogswell, J. H. Bean, F. E. Woodley and Henry W. Wright; and L. E. Lampton, Clerk, by Mame B. Beatty, Deputy Clerk. (Road Book

34, page 352.) In re streets in tract No. 7874: Approval of new contract and bonds for improvement work. An agreement dated December 15th, 1925, by and between the County of Los Angeles and W. D. Mitchell, for the improvement of streets in tract No. 7874, together with a bond in the sum of \$8,408.86, conditioned for the faithful performance of said agreement, and a bond in the sum of \$16,817.73, conditioned for the payment of laborers and materialmen, said bonds being executed by W. D. Mitchell as principal, and Metropolitan Casualty Insurance Co. of New York as surety, said agreement and bonds being submitted in lieu of agreement and bonds heretofore furnished in said matter, are presented; and on motion of Supervisor Wright, duly seconded and carried, it is ordered that said agreement and bonds be, and they are hereby approved."

This evidence was offered by plaintiff to meet the objection that the Mitchell agreement was without consideration. It was objected to by defendant upon the ground that it tended to add to or vary the terms of the Mitchell agreement. The court thereafter struck out all of this evidence on motion of the defendant. Evidence was given and the court found that only about 15 per cent. of the work had been done under the contract and that the cost of completing the work would amount to \$28,590.14. The court found that no damage had been sustained by the county by reason of the failure of defendant Mitchell to complete the work, presumably basing this finding upon the fact that the contract was held to be without consideration.

The provisions which we have quoted are the only ones which relate in any manner to the question of consideration. The board of supervisors by the terms of the Farnsworth contract and as a consideration therefor were to accept the dedication to public use of the highways shown on the map. This they did. The Mitchell contract recited the same consideration, but there remained nothing for the county to do in that respect on the date of the contract, since the streets had been accepted more than a year prior thereto.

Two principal questions are presented: Was any evidence of consideration not stated in the contract admissible? If it was admissible, did the evidence that was stricken out tend to establish the existence of a consideration to such an extent that a refusal of the court to consider it constituted reversible error?

[1] Assigning the exclusion of the evidence referred to as error, appellant relies upon the

rule set forth in section 1962, subd. 2, Code Civ. Proc., that where a writing recites a consideration, parol or extrinsic evidence may be received to show the true consideration to be other than the one recited. The following, among other cases, are cited: *International Mortgage Bank v. Eaton*, 39 Cal. App. 39, 177 P. 880; *Royer v. Kelly*, 174 Cal. 70, 161 P. 1148; *Richardson v. Lamp*, 209 Cal. 668, 290 P. 14; *Field v. Austin*, 131 Cal. 379, 63 P. 692; *Gardner v. Watson*, 170 Cal. 570, 150 P. 994.

Respondent relies upon cases holding that where the statement of consideration is contractual or a promise to do specific things, such provision cannot be enlarged or modified by parol or extrinsic evidence, citing *Hendrick v. Crowley*, 31 Cal. 472; *Arnold v. Arnold*, 137 Cal. 291, 70 P. 23; *Harding v. Robinson*, 175 Cal. 534, 166 P. 808, and similar cases.

If the consideration stated, namely, the acceptance of the offer of dedication, appeared in the Mitchell contract as a mere recital of a past event and not as a contractual and executory obligation of the board, some of the evidence offered by plaintiff was erroneously excluded. We do not doubt that the reference to the acceptance of the highways was nothing more than a recital of something that had already taken place and was not in any sense contractual. In fact, respondent concedes this to be true when it urges the defense of failure of consideration. The argument of respondent is that the county was bound to do nothing because the thing it might have agreed to do had already been done. It is not suggested that it was not known to the contracting parties that the offer of dedication had long since been accepted. The same language found in the Farnsworth contract related to something to be done in the future, but as found in the Mitchell contract it must be construed in conformity with the obvious understanding of the parties, who could not have believed it to be executory. Extraneous evidence of consideration was therefore admissible.

[2, 3] The testimony of Farnsworth that Mitchell had orally agreed with him at the time of the exchange of properties that he would assume Farnsworth's obligation to do the improvement work and would complete it at his own expense was admissible upon the question of consideration. This agreement on the part of Mitchell entered into the consideration passing between him and Farnsworth, even though it was not in writing. *Norris v. Lilly*, 147 Cal. 754, 82 P. 425, 109 Am. St. Rep. 188. Farnsworth

testified that Mitchell's assumption of the obligation was his, Farnsworth's, principal object in making the exchange of properties. The evidence offered on this phase of the case was sufficient, prima facie, to show that Mitchell's undertaking to do the improvement work was one of the terms and conditions under which he acquired the Farnsworth land. Farnsworth testified, as a part of the evidence stricken out, that Mitchell said "that he would take over those obligations * * * that he would take over, put in the streets, sidewalks and curbs," etc. While it does not appear that Mitchell agreed in so many words to enter into a new contract with the county, it does appear that Farnsworth went with Mitchell to the appellant bonding company to arrange for the bond here sued on. Following this, the new contract and bond were given the county. Thus Mitchell took over the obligations in a very effective way and in a manner agreeable to Farnsworth as a part of the price he paid for the Farnsworth land. Upon these facts his contract with the county was not without consideration. It does not matter that it came from Farnsworth rather than the county. Section 1605, Civ. Code. We are of the opinion that the evidence offered of the oral agreement between Farnsworth and Mitchell should have been received.

[4] Appellant claims that a further consideration is proved by the following facts: Under the contract of Farnsworth, Peterson, and Glessman with the county, dated April 30, 1924, the work was to be completed in one year; upon application of the contractors, that time was extended for another year and the county was entitled to have the work completed by April 30, 1926. Mitchell acquired his interest in the subdivision in December, 1925. By the terms of his contract with the county he was given a year from that date in which to do the work. Had he acquired the land without this added time, there would have remained but four and one-half months in which to comply with the terms of the Farnsworth contract. It was undoubtedly to his advantage to have an additional seven and one-half months for that purpose. It is true that the obligation was not his originally, but it became his if and when he assumed it as testified to by Farnsworth. The element of time of performance under the two contracts becomes material because the obligations they represented were the subject of negotiation between Farnsworth and Mitchell and the court should have considered all evidence bearing upon the alleged agree-

ment of Mitchell to take over the work from Farnsworth.

The county had an interest in having the improvement work done in the new subdivision. The highways had become open to public use and their improvement at private expense was a matter of public concern. When the time was extended for the completion of that work, the county suffered a detriment because of the delay. That was a consideration for the contract. Section 1605, Civ. Code; 6 Cal. Jur. 193.

The extension, it is true, was granted to Mitchell, not to Farnsworth, but we do not see wherein that fact is significant. It will not be presumed that the board of supervisors, having agreed with the new owner for a longer time for completion of the work, would take the duplicitous position that it could at the same time insist on an earlier completion under the first contract.

[5] The ruling of the court was correct in so far as it applied to the letter of the road commissioner to the board of supervisors and the minutes of the board offered for the purpose of showing that the Mitchell bond and contract were tendered and accepted "in lieu" of those of Farnsworth and his surety. There is nothing in the record to show that the alleged substitution was made in response to any agreement between the board and any of the other interested parties. It does not appear that any one requested such action or that it was other than gratuitous and voluntary upon the part of the board. The evidence as offered was not admissible against the defendant because neither Mitchell nor his surety could be bound in the absence of a showing that they were parties to the substitution and no such showing was made or attempted. No proper foundation was laid for the admission of this evidence.

Respondent seeks to justify the exclusion of all of the rejected evidence upon the further ground that its admission would alter the terms of the contract under which the bond was given and create new obligations beyond those it assumed as surety. We are unable to see that such results would follow. The consideration plaintiff sought to prove consisted of executed agreements. It may be that they were unenforceable because they were not incorporated in the written agree-

ment, but having been executed, they were, to the extent we have indicated, as properly the subject of proof tending to show the consideration for the Mitchell contract as though they had consisted of payments of money. The liability or obligation of respondent was in no way enlarged by proof of the fact that the agreement of its principal was supported by a consideration. It was bound to know that the mere recital of one consideration for the agreement did not preclude the existence of others. The evidence offered did prove the existence of a liability that might not otherwise have been shown, but it did not alter or enlarge that liability or create a new one.

[6, 7] It is also argued that the amended complaint fails to state a cause of action, in that it affirmatively appears therefrom that there was no consideration for the agreement. This point is substantially answered by what has already been said upon the subject of consideration. A consideration is presumed and need not be alleged. The fact that a consideration is recited which may be wholly insufficient leaves the door open for proof of a valid consideration. The presumption attaches in such a case with equal force as though no consideration whatever were recited.

Respondent makes the further point that acceptance of an offer to dedicate highways to public use is not necessary; that they may be accepted by public use thereof; and that the act of the board in accepting the highways in question would not furnish a consideration for an agreement to improve the same. We have shown that this was not one of the executory terms of the contract and it is not relied upon by appellant as a consideration therefor. We entertain no doubt, however, that the acceptance of an offer of dedication of highways in a newly subdivided tract of land, creating public rights therein, and imposing certain public burdens, is of mutual benefit to the public and the landowner.

The evidence which we hold to have been erroneously stricken out was vital to plaintiff's case. Its exclusion makes it necessary that the issues be retried and the judgment is therefore reversed.

I concur: YORK, J.

I dissent: HOUSER, Acting P. J.

4 Cal.App.2d 596

PEOPLE v. ROBERTS.

Cr. 1829.

District Court of Appeal, First District,
Division 2, California.

Feb. 15, 1935.

1. Burglary ☞19

Information charging that defendant "did feloniously and unlawfully and burglariously enter with felonious intent to and did take, steal and carry away * * *," held not insufficient because not alleging entry with intent to commit theft or any other felony, since charge "intent to steal" is synonymous with "intent to commit larceny" (Pen. Code, §§ 459, 484).

[Ed. Note.—For other definitions of "Intent to Steal," see Words & Phrases.]

2. Burglary ☞23

Information held not insufficient because not alleging that premises entered and property stolen therefrom did not belong to defendant, where ultimate crime pleaded was burglarious entry, and it was not necessary to plead all elements of crime (Pen. Code, §§ 459, 484).

3. Burglary ☞41(3, 8)

Evidence held not insufficient to sustain conviction of burglary because evidence did not prove intent to commit theft or that money found on defendant was not his property, where it was not necessary to prove that money found was not defendant's property, and intent could be inferred from circumstances (Pen. Code, §§ 459, 484).

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

John Wesley Roberts was convicted of burglary, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sifton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant was tried before a jury upon an information in three counts; the first charging burglary, the second robbery, and the third a prior conviction of burglary. The jury found him guilty of burglary, and not guilty of robbery. He admitted the prior conviction. The appeal is from the judgment on the verdict and from an order denying a new trial.

The defendant was found in an inn located in El Cerrito at about 3:30 a. m. by the son of the proprietor. The defendant advanced upon him with his hand in his overcoat pocket in such a way as to give the impression that he carried a gun. He told the young man "not to do anything foolish" as he did not want to hurt him and demanded that he be let out of the door. After he had left it was found that the money had been taken from its hiding place and that a rear window had been pried open with an iron bar which was found nearby. The defendant was arrested a few hours later and was identified as the man who had been found in the inn. He then had in his possession about \$70, including two rolls of nickels and two rolls of pennies, all of which had been wrapped in separate papers and marked by an employee of the inn. Prior to the burglary the defendant had been carousing with another man and a woman and was then practically without funds. These three had been visiting various beer halls, traveling in an automobile owned by the woman. The iron bar found at the inn was claimed by her. When arrested and accused of the crime, and when identified by the innkeeper's son, the defendant stood mute. He took the witness stand in his own defense and, though asked many questions outside the issues of the case, he was not asked anything regarding his participation in the crime charged and he has not denied it.

[1] The first point raised is that the information is insufficient because it does not allege "an entry with intent to commit theft or any other felony." The charge is that defendant "did then and there feloniously and unlawfully and burglariously enter * * * with felonious intent to and did take, steal and carry away * * *." Section 459 of the Penal Code defines "burglary" as an entry "with intent to commit grand or petit larceny or any felony * * *." The charge "intent to steal" is synonymous with "intent to commit larceny" because section 484 of the same Code declares that one who shall "feloniously steal * * * is guilty of theft," and theft and larceny are one and the same.

[2] A further criticism of the information is that it does not allege that the premises entered and the property stolen therefrom did not belong to the defendant. The point is without merit. The ultimate crime pleaded was the burglarious entry. It is not necessary to plead all the elements of that crime, but the pleading may be in general terms. *People v. Myers*, 206 Cal. 480, 482, 275 P. 219.

[3] The appellant states that the evidence is insufficient because it did not prove an intent to commit a theft or that the money found on him was not his property. It was not necessary to prove the latter, while the intent could be inferred from the circumstances which we have related.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



4 Cal.App.2d 719

HOWER et al. v. WOMAN'S HOME MISSIONARY SOC. OF CALIFORNIA CONFERENCE OF METHODIST EPISCOPAL CHURCH.

Civ. 9616.

District Court of Appeal, First District,
Division 2, California.
Feb. 21, 1935.

1. Mortgages ⇐591(3)

Evidence sustained finding that lien claimants had agreed to refinance property on which liens were claimed and against which foreclosure proceedings were pending, and that they had failed to do so within a reasonable time; and that their rights under such agreement were thereby terminated.

2. Evidence ⇐450(5)

Under agreement by which holders of trust deed gave owner and lien claimants opportunity to finance property in order to save property from pending foreclosure, parole evidence which did not vary terms of the written instrument but explained ambiguous provisions thereof held admissible.

3. Trusts ⇐61(3)

Under agreement by which holders of deed of trust gave owner and lien claimants opportunity to refinance property in order to save property from pending foreclosure, any trust created by agreement held terminated where owner and lien claimants failed to perform within reasonable time their promise to refinance property.

Appeal from San Mateo County; George H. Buck, Judge.

Action by C. S. Hower and others against the Woman's Home Missionary Society of the

California Conference of the Methodist Episcopal Church, in which defendant filed a cross-complaint. Judgment for defendant, and plaintiffs appeal.

Affirmed.

William E. Gearhart, of San Francisco, for appellants.

Henderson, Henderson & Carey, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiffs were lien claimants on certain real property upon which defendant held two deeds of trust. During foreclosure proceedings under one of said deeds of trust, said parties, together with the owner of said property, entered into a certain written agreement for the purpose of permitting the refinancing of the property. The property was not refinanced and several years elapsed. Plaintiffs brought this action, seeking an accounting and the appointment of a receiver. Defendant filed an answer and cross-complaint whereby it sought judgment declaring that plaintiffs had failed, neglected, and refused to perform the provisions of said agreement on their part to be performed and quieting defendant's title to said property as against plaintiffs. Upon a trial by the court sitting without a jury, defendant had judgment, from which judgment plaintiffs appeal.

The controversy here arises out of the agreement entered into between the parties. The property was owned by Marcel E. Juilly. He borrowed the sums of \$3,000 and \$2,000, respectively, from defendant. Said loans were evidenced by promissory notes and secured by deeds of trust which were recorded. He had a prospective purchaser for the premises and the lien claims arose out of the work of remodeling the premises. It was conceded on the trial that defendant's deeds of trust had priority over these lien claims. The sale to the prospective purchaser was not consummated. Some of the lien claimants filed actions to foreclose their liens and defendant commenced proceedings to foreclose one of the deeds of trust. While these proceedings were pending, several conferences were held which resulted in the agreement in question between defendant herein as party of the first part, plaintiffs herein as parties of the second part, and Mr. Juilly as party of the third part.

Said agreement contains some rather singular provisions. The plaintiffs herein agreed to waive their liens and defendant agreed to assign its "beneficial interest under said deed

of trust" to California Pacific Title & Trust Company with instructions to hold "the beneficial interest as trustees for the party of first part hereto for the amounts of their liens and for the following-named seven lien claimants (setting forth the names of plaintiffs and the amounts of their liens) and Marcel E. Juilly as hereinafter provided." It was then provided: "It is further mutually understood by and between the parties hereto that after the foreclosure of said deed of trust the property shall be refinanced by California Pacific Title and Trust Company, or their representative, in any amount satisfactory to the parties hereto, and that the moneys realized upon such refinancing shall be distributed as follows:" First, to pay \$5,000, together with interest, etc., to the party of the first part (defendant herein) to satisfy the loans; second, the balance to the lien claimants (plaintiffs herein) in proportion to the amounts of their respective liens. After the "refinancing as herein mentioned," the title company was to convey title to the property to Mr. Juilly. It was also agreed that in the event the lien claimants were not paid in full "by moneys raised to refinance the herein described real property as above provided, then either all rents received from said real property shall be placed with the California Title and Trust Company and be prorated among said claimants herein upon any balance remaining unpaid on their respective claims until the same shall have been fully paid and discharged or the said Marcel E. Juilly shall have the option of paying off the balance of the said five (seven) lien claimants, who agree to accept ninety (90) per cent thereof in full satisfaction."

After the signing of said agreement, a trustees' sale was held in the foreclosure proceedings under the deed of trust and a trustees' deed was thereafter executed to the California Pacific Title & Trust Company as the purchaser at said sale. This trustees' sale resulted in vesting the legal title in the title company and this seems to have been treated as the means of complying with the provision of the agreement for assigning the "beneficial interest under said deed of trust" to said company. As above stated, the property was never refinanced and this action was brought more than three years after the above-mentioned agreement was executed.

[1] Upon the trial, plaintiffs offered no evidence, and by consent, judgment was entered against them on their complaint. The trial proceeded on the issues made by defendant's cross-complaint and plaintiffs' answer there-

to. In said cross-complaint it was alleged, among other things, "that under the terms and provisions of said contract, the plaintiffs herein, as representatives of the said California Pacific Title and Trust Company, agreed to refinance the property," and that plaintiffs failed, neglected, and refused to refinance said property for more than three years. In the answer to the cross-complaint plaintiffs denied "that under the terms of and/or provisions of said contract, plaintiffs, or any of them, agreed to be representatives of the said California Title and Trust Company in the matter of refinancing the said property." Testimony was introduced by defendant to show the meaning of that portion of the agreement providing that "the property shall be refinanced by California Pacific Title and Trust Company, or their representative." This testimony covered the circumstances preceding and surrounding the making of the agreement. It clearly showed that the agreement was entered into by the defendant for the purpose of giving the owner and lien claimants an opportunity to refinance the property in order to save themselves from the harsh consequences of the pending foreclosure under the deed of trust. In other words, it tended to show that the words "or their representative" were intended by the parties to refer to the owner or any one of the lien claimants who was interested in refinancing for the purpose of preventing a total loss of all the rights of said owner and said lien claimants by the foreclosure of the deed of trust. That this was intended by the parties is borne out by plaintiffs' complaint where it was alleged "that the plaintiffs as representatives of the said Title and Trust Co. have diligently attempted to refinance the said property." It was admitted that plaintiffs had been unsuccessful in attempting such refinancing and that the owner had abandoned his efforts and quitclaimed his interest in said property. The effect of the trial court's findings and judgment was to declare that by the terms of the agreement, plaintiffs had agreed to refinance said property; that they had failed to do so within a reasonable time; and that their rights under said agreement were thereby terminated. In our opinion, the evidence fully supports the findings and judgment entered.

[2, 3] Plaintiffs attack the findings relating to want of consideration for the agreement, but in view of the conclusion which we have reached, said finding becomes immaterial. They further contend that the trial court's judgment was based upon an oral agreement

which varied the terms of the written agreement. This contention may not be sustained as the parol evidence was admitted, not to vary the terms of the written instrument, but to explain the ambiguous provisions thereof. Lastly, they assert that the trial court's judgment is against law as it terminated an express trust without the consent of all the beneficiaries. We believe, however, that the trial court properly concluded that any trust created by said agreement should be terminated because of plaintiffs' failure to perform within a reasonable time their promise to refinance said property.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



Plaintiff's husband purchased the vegetables; his wife, the plaintiff, ate of them and became ill. The findings assume, rather than assert, that arsenic was in or on the vegetables when purchased. We therefore make the same assumption.

Upon competent evidence the findings absolve defendants from the charge of negligence. *Minutilla v. Providence Ice Cream Co.*, 50 R. I. 43, 144 A. 884, 63 A. L. R. 334. Under the authorities the warranty, if any, went to the purchaser only, and the purchaser is not the party plaintiff. *Rhodes v. Libby, McNeill & Libby*, 133 Or. 128, 288 P. 207; *Chysky v. Drake Bros. Co.*, 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533; *Welshausen v. Charles Parker Co.*, 83 Conn. 231, 76 A. 271.

The judgment is affirmed.

We concur: CRAIL, J.; SCOTT, Justice pro tem.



5 Cal.App.2d 15

BINION v. SASAKI et al.
Civ. 9243.

District Court of Appeal, Second District,
Division 2, California.
Feb. 27, 1935.

Sales ⇨255

Plaintiff, whose husband purchased vegetables allegedly impregnated with arsenic, causing plaintiff's illness, *held* not entitled to recover for negligence in selling such vegetables, since warranty, if any, of fitness for human consumption went to purchaser only.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Ida Binion against K. Sasaki and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

A. J. Bledsoe, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

The trial court awarded judgment for defendants in an action for damages for negligence in selling vegetables impregnated with arsenic and upon an alleged warranty that they were fit for human consumption. Plaintiff appeals.

5 Cal.App.2d 25

KUEHN v. DON CARLOS et al.
Civ. 1334.

District Court of Appeal, Fourth District,
California.
Feb. 28, 1935.

Rehearing Denied March 28, 1935.

Hearing Denied by Supreme Court
April 29, 1935.

1. Attachment ⇨53, 177

Right to attach mortgaged personal property may be exercised only after compliance with the condition of payment, tender, or deposit of amount of mortgage debt, and in absence of such compliance no lien is created by attempted levy (Civ. Code, §§ 2968-2970).

2. Chattel mortgages ⇨136

Chattel mortgagee may waive his mortgage lien or be estopped to enforce it as by authorizing sale upon condition that proceeds be deposited to his account, or other conduct inconsistent with existence of mortgage lien.

3. Chattel mortgages ⇨136

Mortgagee who consented to sale of mortgaged airplane on execution in order to have balance of mortgage debt included as item of costs and filed third-party claim and receipt for payment with justice, although receiving no money, *held* to have waived lien and not entitled to recover possession of airplane merely because judgment creditor failed to perform agreement by either purchasing airplane or bidding sufficient to satisfy mortgage indebtedness (Civ. Code, §§ 2968-2970).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Ed Kuehn against F. Don Carlos and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Barcroft & Barcroft, of Madera, and Martin Thuesen, of Fresno, for appellants.

Siemon, Clafin & Maas, of Bakersfield, for respondent.

ALLYN, Justice pro tem.

In this action for claim and delivery of an airplane, based upon a chattel mortgage giving to the mortgagee the right to possession upon default of the principal obligation, it was set up in defense that the mortgagee had waived the lien of his mortgage by allowing a balance of the principal and interest secured by the mortgage to be included as costs as provided by sections 2969 and 2970 of the Civil Code in a justice court action in which the airplane was levied upon on a writ of execution, and further that the mortgagee was estopped to claim the lien of his mortgage by an agreement he had made with the judgment creditor whereby the latter agreed to either pay the mortgagee the balance of the mortgage indebtedness or deliver to him the airplane upon payment of the amount of his judgment plus costs of sale. It appears that a receipt of plaintiff was filed showing payment to him of the amount of this balance by the judgment creditor although it was stipulated that no money was actually paid on this account. The constable proceeded to sell the property free from the mortgage although the judgment creditor was present at the sale and announced that there was a mortgage against the property. It was sold for an amount much less than the judgment, costs of sale, and the mortgage balance. The defendant F. Don Carlos is the mortgagor and the defendant Beck a successor in interest of the purchaser at the sale.

[1] It is well established that the right to attach mortgaged personal property can be exercised only after compliance with the condition of payment, tender, or deposit of the amount of the mortgage debt (Civ. Code, §§ 2968, 2969, and 2970), and that without such compliance no lien is created by the attempted levy. *Sousa v. Lucas*, 156 Cal. 460, 105 P. 413. In the latter case the mortgagee sought to foreclose a crop mortgage as against the mortgagor, an attaching creditor, and the sheriff levying the writ. It was directly held

that a levy under such circumstances was unlawful and was not a valid seizure of the interest remaining in the mortgagor.

In this case if the plaintiff mortgagee had merely stood by there could be no question of his right to foreclose the mortgage and reclaim his security from the purchaser at the sale or his successors in interest or from the officer who levied the writ. Did his action in entering into the agreement with the judgment creditor, whereby the latter either agreed to pay him the mortgage balance or deliver the airplane upon payment of the judgment plus costs of sale, and in filing a third-party claim and a receipt in full with the justice of the peace amount to a waiver of his lien, or did it create an estoppel to enforce it? Admittedly the whole procedure was irregular. The plaintiff could have stood by or he could have filed his claim with the constable. Instead, he negotiated with the judgment creditor for the sale of the property on execution and in order to have the balance of the mortgage debt included as an item of costs filed with the justice a third-party claim and a receipt for payment, although in fact he received no money.

[2, 3] A chattel mortgagee may waive his mortgage lien or be estopped to enforce it by conduct inconsistent with its existence. 11 C. J. p. 674; 5 Cal. Jur., p. 88. Thus, consent to sell under certain circumstances may constitute a waiver. 5 R. C. L. p. 458. A sale authorized by the mortgagee upon condition that the proceeds be deposited to his account operates to extinguish the mortgage lien. *Maier v. Freeman*, 112 Cal. 8, 44 P. 357, 53 Am. St. Rep. 151. In this case, if the airplane had been sold for an amount sufficient to discharge the mortgage indebtedness it appears to be fundamental that the mortgagee could not assert his lien as against the purchaser merely because the judgment creditor failed to pay over the money received from the sale. It is not reasonable that the rule should be any different merely because the judgment creditor failed in the performance of his agreement by neither purchasing the property nor bidding up to the amount of the mortgage indebtedness and thus assuring a sufficient return from the sale to satisfy plaintiff's demand. The conduct of the mortgagee, as disclosed by the record in this case, was so inconsistent with the continued existence of the mortgage lien that we are forced to the conclusion that the lien was waived.

The judgment is accordingly reversed.

We concur: BARNARD, P. J.; MARKS, J.

4 Cal.App.2d 659

VETERANS' WELFARE BOARD v. BURT
et ux.

Civ. 1522.

District Court of Appeal, Fourth District,
California.

Feb. 19, 1935.

Hearing Denied by Supreme Court
April 18, 1935.

1. Vendor and purchaser ⇨299(3)

In action by Veterans' Welfare Board to quiet title to property sold defendant under Veterans' Farm and Home Purchase Act, evidence that alleged head of board's collection department had orally waived time of payment of delinquent installments *held* properly excluded, in view of absence of proof of his authority, and fact that defendant was chargeable with notice of his actual authority and with notice that act vested authority to postpone payments in board, and fact that defendant continued to receive regular demands for defaulted and current payments (St. 1921, p. 815, as amended; Code Civ. Proc. §§ 738, 749).

2. Trial ⇨400(1)

Trial court has ample power to change or add to its findings and to modify its judgment in ruling on motion for new trial in order to give true expression to its decision (Code Civ. Proc. § 662).

3. Vendor and purchaser ⇨299(3)

In action by Veterans' Welfare Board to quiet title to property sold to defendant under Veterans' Farm and Home Purchase Act, general finding that title to property was in board *held* sufficient to sustain judgment for board, as against defense that time of payment of delinquent installments had been waived, where no adequate evidence was presented to support issue of waiver and record required finding that there was no waiver (St. 1921, p. 815, as amended; Code Civ. Proc. §§ 738, 749).

4. Vendor and purchaser ⇨299(4)

In vendors' actions to quiet title, interlocutory decrees whereby defaulting purchaser is given definite time within which to make defaulted payments are within trial court's discretion.

5. Appeal and error ⇨946

Rulings within trial court's discretion will not be interfered with, in absence of clear showing of abuse.

6. Vendor and purchaser ⇨299(4)

In action by state Veterans' Welfare Board to quiet title to property sold to defendant under Veterans' Farm and Home Purchase Act, refusing proposed interlocutory decree providing five-months moratorium within which to cure defaults *held* not

abuse of discretion, where defendant had been in possession for one year without any payment save insignificant initial deposit and one monthly installment (St. 1921, p. 815, as amended; Code Civ. Proc. §§ 738, 749).

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Action by the Veterans' Welfare Board of the State of California against William Luther Burt and wife. Judgment for plaintiff, defendants' motion for a new trial was denied, and defendants appeal.

Attempted appeal from order denying motion for new trial dismissed, and judgment affirmed.

James E. Fenton, of Los Angeles, for appellants.

Albert E. Sheets, of Sacramento, for respondent.

ALLYN, Justice pro tem.

The defendant and appellant in July of 1931 entered into an agreement with plaintiff and respondent to purchase a house and lot under the provisions of the Veterans' Farm and Home Purchase Act. Chapter 519, Stats. 1921 (page 815), as amended by chapter 405, Stats. 1923 (page 911), chapters 822, 825, Stats. 1927 (pages 1649, 1656), and chapter 1014, Stats. 1931 (page 2027). The total purchase price under the contract was \$5,255, payable \$262.75 cash and the balance in monthly installments of \$32.96, beginning September 1, 1931. The defendant paid the first installment on October 31, 1931. No further payments were made or tendered until February 13, 1932, at which time defendant offered a payment of \$30. This money was subsequently returned to him. In the meantime and on January 19, 1932, the plaintiff board passed a resolution and mailed a copy thereof to defendant whereby it set the date of cancellation or forfeiture for February 19, 1932, unless all defaulted installments were paid on or before that date. On February 19th a resolution declaring the forfeiture of the contract for default in payments was duly passed and the defendant notified by mail as provided by the contract. Regular statements showing the amount of past-due and current installments were mailed to defendant on the first of each month. An action to quiet title (Code Civ. Proc. § 738) and to determine adverse claims (Code Civ. Proc. § 749) was thereafter brought against the purchaser and his wife. The an-

swer pleaded the contract and a waiver of strict compliance as to the terms of payment. The trial court gave judgment for plaintiff. While a motion for new trial was pending, amended findings were filed. The motion for new trial was denied and defendant appeals, relying upon four assignments of error: First, that the trial court erred in sustaining an objection to the proffered evidence that defendant had talked with the alleged head of plaintiff's collection department in Los Angeles and that he had orally waived the time of payment for the delinquent installments; second, that the trial court was in error in amending its findings pending the motion for new trial; third, that a general finding that title to the property was in the plaintiff and not in the defendant was not a sufficient finding upon the defense of waiver; and, fourth, that the trial court should have granted an interlocutory decree rather than an absolute one.

[1] The first assignment of error must be dismissed for the reason that there was no proof of the agency or authority of the alleged head of the collection department of the Los Angeles office of the board. *Harris v. Miller*, 196 Cal. 8, 235 P. 981; *Flickinger v. Wrenn Investment Co.*, 172 Cal. 132, 155 P. 627. Furthermore, if it be admitted that the party with whom the alleged conversation was had was the head of the collection department, defendant was dealing with a public agent and was charged with notice of his actual authority (*Walker v. Department of Public Works*, 108 Cal. App. 508, 291 P. 907) and of the fact that such power and authority to postpone payments in individual cases is by the express terms of the veterans' act vested in the board (see *California Highway Commission v. Riley*, 192 Cal. 97, 218 P. 579). Furthermore, defendant could not have been misled by the action of the collection department for the reason that each month he received regular statements and demands showing the amount of defaulted and current payments due.

[2] A trial court has ample power to change or add to its findings and to modify its judgment in ruling upon a motion for new trial (Code Civ. Proc. § 662; *Moore v. Levy*, 128 Cal. App. 687, 18 P.(2d) 362) in order to give true expression to the decision of court (*Heron v. Bray*, 122 Cal. App. 79, 9 P.(2d) 513).

[3] The general finding that the title to the property was in plaintiff and not in defendant was sufficient for the reason that no adequate evidence was presented or offered to support

the issue of waiver, and further because the record would require a finding on this issue adverse to appellant. *Hawkins v. Hawkins*, 104 Cal. App. 608, 286 P. 747; *Maloof v. Maloof*, 175 Cal. 571, 166 P. 330.

[4-6] Interlocutory decrees in actions of this kind, whereby a defaulting party is given a definite time within which to make defaulted payments, are within the discretion of the trial court. *Los Angeles Auto Tractor Co. v. Superior Court*, 94 Cal. App. 433, 271 P. 363. Rulings within the court's discretion will not be interfered with in the absence of a clear showing of abuse. *Waybright v. Anderson*, 200 Cal. 374, 253 P. 148. At the time of the trial, defendant had been in possession of the property involved for one year without any payment save the insignificant initial deposit and one monthly installment. The proposed interlocutory decree provided for a further moratorium of five months within which to cure defaults. The request was unreasonable and in view of all circumstances of the case the trial court was amply justified in denying it and in entering an absolute decree.

The attempted appeal from the order denying the motion for new trial is dismissed and the judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



4 Cal.App.2d 626

CLINE v. CLINE.

Civ. 1168.

District Court of Appeal, Fourth District,
California.

Feb. 18, 1935.

1. Divorce ⇨108

What particular facts must be alleged and proved to justify finding in divorce case that spouse has undergone grievous mental suffering is fact question to be deduced from all circumstances of each case with correct decision depending on sound sense of justice of trial court.

2. Husband and wife ⇨248½

Where husband's separate property is commingled with community, and cannot be clearly segregated or traced, community being paramount estate draws whole mass to it, unless community interest is inconsiderable in

property with which it has been commingled, in which case community will not draw to itself separate estate.

3. Divorce ⇐249(3)

In divorce case, finding that all property was separate property of husband, except \$2,000 allowed wife as value of desert entry which was set aside to her as separate property, and household furniture which was assigned to her by stipulation as community property, *held* justified as against contention that separate character of husband's property was lost by intermixture and commingling with community, where husband's separate estate was clearly traced.

4. Divorce ⇐281

In divorce case, wife cannot complain of finding that her desert entry was her separate property, and of judgment in her favor for value thereof, where she received decision most favorable to her under facts, since in such case she was not "aggrieved party" (Code Civ. Proc., § 938).

[Ed. Note.—For other definitions of "Aggrieved Party," see Words & Phrases.]

Appeal from Superior Court, Imperial County; Charles C. Haines, Judge.

Action by Daisy F. Cline against Hosea C. Cline, in which defendant filed a cross-complaint. From an adverse judgment, plaintiff appeals.

Affirmed.

See also 23 P.(2d) 431, 132 Cal. App. 713.

M. C. Atchison, of Calexico, for appellant.

Utley & Nuffer, of El Centro, for respondent.

ALLYN, Justice pro tem.

Plaintiff appeals from a judgment denying her a divorce on her complaint for cruelty, granting defendant a decree upon the grounds of cruelty upon his cross-complaint and setting aside the major portion of the property involved to defendant as his separate property.

[1] No useful purpose will be served by setting forth the evidence in the case on the charges and countercharges of cruelty. It is sufficient to say that there is ample evidence in the record to support the findings of the trial court in favor of the defendant. No hard and fast rule can be established as to what particular facts must be alleged and proved to justify a finding that a spouse has undergone grievous mental suffering. A cor-

rect decision must depend upon the sound sense of justice of the trial court. It is a question of fact to be deduced from all the circumstances of each case. *Barnes v. Barnes*, 95 Cal. 171, 30 P. 298, 16 L. R. A. 660; *Shaw v. Shaw*, 122 Cal. App. 172, 9 P.(2d) 876.

There is no substantial controversy as to the facts on the issue of property rights. At the time of the marriage of the parties in 1917, the defendant owned an undivided one-half interest in the New River Land & Cattle Company, of Phoenix, Ariz., at one time valued at more than \$50,000, a one-half interest in an alfalfa ranch, and several lots of city property. Through the years following the marriage defendant acquired the entire cattle business through purchase by money raised through borrowing and through the sale of cattle and city lots and also divided his interest in the alfalfa ranch, securing some 80 acres thereof in absolute ownership. The cattle ranged in number from about 3,500 head to 1,800 at the time of the sale of defendant's cattle interests, the fluctuation being caused by the natural increase of the herd and by decrease through sale and starvation brought about by the drought of 1925 and 1926. Prior to the sale of the Arizona properties, plaintiff filed a desert claim on public land adjoining defendant's ranch, which claim was improved to some extent, all of the costs of filing and improvement being paid by the defendant out of the ranch moneys. In 1927 the defendant sold all of his Arizona holdings, netting some \$40,000. As a part of the transaction, plaintiff relinquished her desert claim to the purchaser, it being included in the general purchase price.

The parties then moved to the village of Bond's Corner, in Imperial county of this state, bringing with them the \$40,000 salvaged from the Arizona enterprise. Here the defendant purchased an undivided one-half interest in a 20-acre tract of land with store buildings and other improvements and later a one-half interest in the general merchandise store operated thereon. The total purchase price of these properties amounted to about \$15,000. The defendant subsequently sold his interest in the merchandise business. During all of this time and until the separation, plaintiff carried on her housewifely duties, cooked for the men, and on occasion rode the range, and upon their removal to California clerked in the store when she was needed. Defendant had no income except from the properties and business and had no occupation save the management thereof. At the

time of the final separation, the property consisted generally of the undivided interest in the real property at Bond's Corner, valued at about \$10,000; \$13,000 in cash; and miscellaneous personal property, including household furniture, of the total value of about \$2,400.

On these facts the trial court found that all of the property was the separate property of the defendant save and except \$2,000 allowed the plaintiff as the value of her desert entry, which was set aside to her as separate property and the household furniture, which was assigned to her by stipulation as community property.

"All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." Civ. Code, § 163.

[2, 3] It is argued by the appellant that the separate character of the defendant's property was lost by intermixture and commingling with the community to such an extent that its identity was lost. It is true that in such a situation, where the separate property cannot be clearly segregated or traced, the community being the paramount estate, draws the whole mass to it. But it is also true that where the community interest is inconsiderable in the property with which it has been intermingled, the community will not draw to itself a separate estate. In *re Estate of Cudworth*, 133 Cal. 462, 65 P. 1041; In *re Estate of Granniss*, 142 Cal. 1, 75 P. 324; In *re Estate of Pepper*, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092. So, in this case the separate estate of the defendant is clearly traced through the various transactions in Arizona from the original estate with its rents, issues, and profits and the natural increase of the cattle much depreciated in value to the \$40,000 brought to California and here invested in the properties held by the defendant at the time of the trial. There is no evidence of any positive or substantial contribution to this estate by the community through the individual earnings of either spouse. Such earnings as the defendant may be said to have had by reason of his individual efforts in the management of his separate estate may well have been expended by him in the support of his wife, thus leaving his separate estate intact. In *re Estate of Cudworth*, supra; *Seligman v. Seligman*, 85 Cal. App. 683, 259 P. 984.

[4] Appellant cannot complain of the finding of the trial court that her desert entry in

Arizona was her separate property and the judgment in her favor for the value thereof for the reason that she received the decision most favorable to her under the facts of the case and hence she is not an aggrieved party. Code Civ. Proc., § 938; 2 Cal. Jur., p. 215.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



4 Cal.App.2d 669

**VENTURA UNION HIGH SCHOOL DIST.
OF VENTURA COUNTY v. VAN
DELINDER.
Civ. 10061.**

District Court of Appeal, Second District,
Division 2, California.
Feb. 20, 1935.

Mandamus ☞ 16(1)

Mandamus proceeding to compel county treasurer to honor warrant was dismissed on referee's report showing withdrawal of treasurer's fact allegations on which issues arose, and showing payment of warrant.

Petition by the Ventura Union High School District of Ventura County for a writ of mandate against Harry Van Delinder to compel respondent, as county treasurer, to honor a warrant drawn on him for the purchase of land to be used for high school purposes.

Proceedings dismissed.

Clarke & Bowker, of Los Angeles, for petitioner.

Don R. Holt, of Ventura, for respondent.

PER CURIAM.

A warrant for the payment of a sum of money was regularly drawn upon the treasurer of Ventura county for the purchase of land to be used for high school purposes. The treasurer of the county refused payment upon several grounds. The high school district filed a petition in mandate with this court to compel the treasurer to honor the warrant. A return was made in which certain issues of fact were raised, and the court appointed its presiding justice to proceed to

the city of Ventura and there take evidence as the court's referee.

The presiding justice complied therewith and has reported to this court to the effect that the allegations of fact upon which the issues arose have been withdrawn and that the said referred to warrant has been paid.

Wherefore it is ordered that the proceedings be, and they are hereby, dismissed.



4 Cal.App.2d 770

PEOPLE v. LYON.

Cr. 2616.

District Court of Appeal, Second District,
Division 1, California.

Feb. 26, 1935.

Larceny ⇐55

Evidence held insufficient to sustain conviction of stockbroker, who received cash from customer for purchase of stock and purchased stock from correspondent on credit, of crime of grand theft (Pen. Code, §§ 20, 21).

Appeal from Superior Court, Los Angeles;
Frank M. Smith, Judge.

James Lyon was convicted of grand theft. From the judgment of conviction and an order denying his motion for new trial, he appeals.

Judgment and order reversed.

Clifford Thoms, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

From a judgment of conviction of the crime of grand theft, as well as from an order by which his motion for a new trial was denied, defendant has appealed to this court.

As far as concerns a determination of the point presented by appellant to the effect that the evidence was insufficient to support the judgment, the following constitutes a brief summary of the evidence adduced on the trial of the action:

Defendant was engaged in business in the city of Los Angeles as a stockbroker. Habitually he made his purchases of stock, either on margin or for cash, through a firm of stockbrokers whose business was located in the city of Denver, Colo. Through defendant and his Denver correspondent, some of defendant's customers had made large purchases of stock on margins, and on account of such transactions, "on vapor," had apparently suffered a considerable pecuniary loss. The several certificates of stock which represented the holdings of such customers of defendant were in the possession of his Denver correspondent, as were some certificates of stock of which defendant was the owner and which had been deposited by defendant with, or which at least were retained by, such Denver correspondent, as security for any indebtedness that might arise or exist against defendant and in favor of said Denver correspondent. In order to retain the good will of his customers who, through their investment with defendant and his Denver correspondent, had lost rather heavily on their marginal investments, defendant took over their rights in their respective holdings and assumed as his own the respective and aggregate losses of such customers. Aside from the obligations thus created, the business of defendant was in a solvent condition; but in connection with the assumed obligations of his customers, the evidence was conflicting as to whether defendant was then insolvent. In such state of affairs, defendant received an order from one Dunham to buy for him 200 shares of "Radio"—on account of which order, and two days after it had been given, Dunham paid to defendant the sum of \$770. At the time when such order was given, Dunham told defendant that he was buying the stock for his mother or his mother-in-law, and that, as distinguished by Dunham, the investment was a "cash transaction"; to which statement defendant responded: "That is perfectly all right, Mr. Dunham, I will wire the order today to Denver and I will mail my check today to Denver, making it a cash transaction." Thereupon defendant telegraphed his order to his Denver correspondent for the shares of stock which Dunham had ordered from defendant; but neither then, nor at any time thereafter, did defendant send his check to his Denver correspondent for the shares of stock thus ordered. On the day when defendant received the \$770 from Dunham, which, as hereinbefore stated, was two days after defendant had bought the stock through his

Denver correspondent, defendant made the statement to Dunham that he (defendant) had "wired the order and had mailed the check * * *." On receipt of such "wire," it appears that the Denver correspondent made the purchase of the stock; its confirmatory message to defendant being as follows: "We confirm purchase for your account and risk of the following securities: Number of shares, 200 Radio Corp. Price $3\frac{3}{4}$; Extension, \$770. Commission, \$20. Total, \$770. * * *"

Thereupon defendant told Dunham that the stock had been bought and inquired of him whether he wished the stock certificate delivered to him, or to his mother or his mother-in-law, for whom the stock had been purchased; to which inquiry Dunham replied in substance that the stock had been bought as a "speculation," and that it should be left where it was in its "street name," in order that if sold the contemplated transaction might be the easier consummated. Within four months thereafter, defendant made to Dunham a general assignment of all his assets for the benefit of defendant's creditors. At that time defendant again suggested to Dunham that he take over to himself, or to his mother or his mother-in-law, the "200 shares of Radio" which defendant had purchased for Dunham, as hereinbefore set forth. Dunham again declined to do so. In that connection, he said: "Well, I am not going to touch that on Mrs. Dunham's account until after the other accounts of the firm are cleaned out."

During a period of several months next ensuing, Dunham administered upon the assets and the liabilities of defendant, at the close of which administration he received from the assignee of defendant's correspondent certain certificates of shares of several different corporate stocks, which included 200 shares of "Radio," for all of which he then paid the sum of \$801.07. It also appears that theretofore, on behalf of one of defendant's customers for whom defendant had acted as a broker, the certificate for other 200 shares of "Radio" stock had been withdrawn by Dunham from the Denver correspondent without paying anything therefor. Additional evidence showed that in view of the business in which defendant was engaged, and particularly in view of the manner in which defendant conducted his business with his Denver correspondent, defendant acted in the manner ordinarily obtaining in the purchase on a "cash transaction" basis of shares of stock that were ordered by a customer of a stockholder.

By sections 20 and 21 of the Penal Code it is provided that: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence. The intent or intention is manifested by the circumstances connected with the offense. * * *"

From a consideration of the evidence adduced on the trial of the instant action, one's mind must be impressed with the conclusion that the offense of which defendant was accused was not committed by him either with an express or an implied intent on his part either to unlawfully convert to his own use the \$770 which had been placed in his possession for the purpose of purchasing, or of paying for, the shares of "Radio" stock, or to feloniously obtain for himself the certificate of ownership thereof. It is a fair inference that defendant either believed, or at least that he had a right to believe, that his credit with his Denver correspondent was such that it was wholly unnecessary that in making a purchase of the 200 shares of "Radio," at that particular time he should forward to such correspondent the cash value of such stock. Besides, as hereinbefore has been stated, at the time when he bought the stock Dunham had not paid defendant therefor. Although the purchase had been ordered by Dunham, it was not until two days thereafter that he actually gave his check to defendant in payment thereof. Notwithstanding the unsatisfactory state of the evidence regarding the solvency of defendant at that time, and perhaps as a matter of good business judgment, questioning the advisability of an extension or enlargement by the Denver correspondent of the credit to which defendant was properly entitled, nevertheless the outstanding fact appears that defendant's credit was such that his Denver correspondent actually purchased the 200 shares of "Radio" for defendant's "account and risk" and that for a long time thereafter such shares of "Radio" were held subject to Dunham's order; but that solely because of the fact that the stock was purchased for speculation, with an intention of its future sale, it was consciously, by the direction or the request of Dunham, permitted to remain in its "street name" in the physical possession of the Denver correspondent. By no outward act, nor by any apparent conduct on the part of defendant, may it be fairly concluded that he had any intention of departing from a fixed business method or standard in transacting the business with which he had been intrusted. If in the subsequent course of events Dunham lost his stock, or,

In order to obtain its possession, in fact was obliged to pay a sum of money in addition to its original cost (which latter fact does not satisfactorily appear), it was by reason of his own fault or negligence. It is concluded that the evidence adduced on the trial of the action was insufficient to sustain the verdict that was returned by the jury.

The judgment and the order by which the motion for a new trial was denied are reversed.



4 Cal.App.2d 727

PEOPLE v. KING et al.

Cr. 1830.

District Court of Appeal, First District,
Division 2, California.

Feb. 25, 1935.

1. Criminal law ☞374

Evidence *held* sufficient to support conviction of second-degree burglary under showing of scheme under which defendant burglarized apartment of apartment house manager while confederate looked at vacant apartment.

2. Criminal law ☞372(10)

In prosecution for second-degree burglary under scheme by which defendant burglarized apartment of manager of apartment house while confederate looked at vacant apartment, evidence showing commission and attempt to commit similar crime *held* admissible to show plan, scheme, or system used by defendant and confederate for purpose of burglarizing apartments of apartment house managers.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Frank King pleaded guilty to a charge of burglary, and Lawrence J. Carmody was convicted of burglary of the second degree, and Carmody appeals.

Affirmed.

Paul Charles Dana, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sifton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

The defendant Lawrence J. Carmody and one Frank King were jointly charged with burglary. King entered a plea of guilty, while Carmody entered a plea of not guilty. Upon a trial by jury Carmody was found guilty of burglary of the second degree, and he appeals from the judgment of conviction and the order denying his motion for new trial.

The charge set forth in the information involved the burglary of the apartment of Mrs. V. R. Velsir at 2626 Ashby avenue, Berkeley, shortly before noon on August 2, 1933. Carmody and King were arrested in San Francisco at about 5:30 p. m. of the same day after King had pawned or sold to one Zwillingher a diamond ring of the complaining witness which had been stolen from her apartment. The two men were separately questioned regarding several burglaries. On August 4, 1933, Carmody was told that King had made a statement to the effect that the two men had gone to Berkeley together on August 2d; that Carmody had entered the apartment of the complaining witness and taken her diamond ring therefrom after the complaining witness had gone upstairs with King to show him a vacant apartment; that Carmody had turned the ring over to King on the boat returning to San Francisco; and that King had sold the ring to a dealer named Zwillingher for \$25 and divided the proceeds with Carmody. To this statement Carmody replied, "I have nothing to say, you will have to see my attorney." A few days later Carmody consented to paying and did contribute \$12.50 out of the money taken from him at the time of arrest toward repaying Zwillingher the \$25 which had been paid by Zwillingher to King for said ring. The remaining \$12.50 was contributed by King out of the money taken from him at the time of arrest. It should be stated that each of the men had more than \$25 on his person when taken into custody. Carmody said, "I will stand my share of the \$25 the ring was pawned for." The two men were charged in San Francisco with the burglary of an apartment house in that city. They entered pleas of guilty to that charge, and each was sentenced to a year in the county jail. After completing their sentences, they were taken to Alameda county to face the charge herein.

On the trial no direct evidence was produced to show that defendant Carmody had entered the apartment of the complaining witness. While King had been in said apartment, he was at all times in the immediate

presence of the complaining witness. In order to connect defendant Carmody with the commission of the offense, the prosecution relied in part upon showing said defendant's actions following his arrest as above set forth. They further relied upon evidence tending to show the plan or scheme under which Carmody and King operated. This latter evidence was admitted over the objection of defendant Carmody.

The prosecution showed that in April, 1933, the apartment of Mrs. Fechter in the city of Berkeley had been burglarized. She, like the complaining witness, was the manager of the apartment house in which she resided. King called at about 11:15 a. m. and asked to see an apartment. Mrs. Fechter took him to one of the apartments facing the street and King immediately raised the shade and looked down into the street. He then engaged her in a lengthy conversation regarding the various features of the apartment and finally concluded by stating that he would bring his wife to see the apartment in the afternoon. Mrs. Fechter had left the back door of her own apartment unlocked and had left a diamond ring and some money in said apartment. Shortly after King's departure she discovered that said ring and \$20 in currency had been stolen from her apartment. She later had a conversation with Carmody and King at the police station. King told her he was sorry and that he would hate to have his mother know he was in trouble. She asked Carmody many questions, but he would not talk, stating only that he knew nothing about the ring. Thereafter, a police inspector conversed with Carmody and showed him a police report regarding the theft of this ring. Carmody read the report which stated in part, "One man looks at apt. while confederate sneaks into manager's unlocked apt. and takes money and jewelry." Thereupon Carmody stated that if he was led out of the city prison for a day or two, he would be able to recover and return that ring. He stated that he had sold that ring to a man for \$190. He further stated that he did not know the man's name but he did give a description of him.

Evidence was also admitted regarding certain events which happened on the morning of August 2, 1933, very shortly before King arrived at the apartment house managed by the complaining witness. This evidence tended to show an attempt by Carmody and King to burglarize the apartment of Mrs. Presher, who managed an apartment house at 2217 Walnut street in the city of Berkeley. King

went to said apartment house at about 11 a. m. of that day and Mrs. Presher took him upstairs to show him a vacant apartment. While Mrs. Presher was so engaged, Carmody was seen by Mr. Presher at the front entrance where the buzzers were located. Thereafter he saw Carmody enter the rear entrance of the apartments. Mr. Presher entered the apartment house and next saw Carmody in the hall backing away from the door of the Presher apartment. Mr. Presher asked him what he wanted and Carmody said he was looking for his friend. Upon being asked his name Carmody gave the name of Conway. Mr. Presher then took Carmody upstairs to find his friend and upon meeting Mrs. Presher and King in an upstairs apartment, Carmody and King greeted each other, told the Preshers they were in a hurry and then departed, saying they would be back that afternoon.

[1, 2] Appellant contends that the evidence was insufficient to sustain his conviction and that the trial court committed prejudicial error in admitting evidence concerning the Fechter and Presher incidents. We find no merit in either of said contentions. As to the first point, we believe that the foregoing recital of the evidence is a sufficient answer to the contention. It is conceded that a burglary was committed and that King was involved therein. The only rational conclusion to be drawn from the evidence is that King did not personally take the ring of the complaining witness, but that he operated with a confederate. The real question is whether appellant was the confederate, and we believe that there was ample evidence to show that he was. As to the second point, we are of the opinion that the evidence of the Fechter and Presher incidents was properly admitted. While such evidence tended to show the commission of other crimes, it was nevertheless admitted to show the plan, scheme, or system used by Carmody and King for the purpose of burglarizing the apartments of apartment house managers. There is ample authority for the admission of such testimony. *People v. McGill*, 82 Cal. App. 98, 255 P. 261; *People v. King*, 122 Cal. App. 50, 10 P.(2d) 89; *People v. Cosby*, 137 Cal. App. 332, 31 P.(2d) 218; 8 Cal. Jur., p. 69, § 173.

The judgment and order denying the motion for new trial are affirmed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

4 Cal.App.2d 724

PARRETT et al. v. CAROTHERS et al.
Civ. 10187.

District Court of Appeal, Second District,
Division 1, California.

Feb. 23, 1935.

Rehearing Denied March 23, 1935.

I. Appeal and error ⇨477

Reviewing court may grant writ of supersedeas, in exercise of sound discretion, on such terms as will be just and will adequately protect respondent's rights, appellant not being entitled to writ as matter of right.

2. Appeal and error ⇨480

Where respondent objected to appellant's undertaking on ground that surety thereon was liability insurer who was liable for judgment appealed from, District Court of Appeal granted appellant's petition for writ of supersedeas on condition that appellant, within fifteen days, file proper undertaking with different surety, and stayed threatened execution on judgment for fifteen days.

Action by Louise G. Parrett and others against Archibald D. Carothers and others, wherein judgment was rendered against defendants, and defendants appealed. On petition for writ of supersedeas.

Petition granted conditionally.

Mathes & Sheppard, of Los Angeles, for appellants.

Newlin & Ashburn, of Los Angeles, for respondents.

CONREY, Presiding Justice.

In this action there is now pending an appeal by the defendants Rix from a judgment rendered against them and the other defendants, in the sum of \$5,000, damages resulting from the death of one Homer C. Parrett, caused by the negligent operation by defendant Warren A. Rix of an automobile. Appellants filed in the superior court an undertaking to stay execution on said judgment, pending the appeal. The Central Surety & Insurance Company, executed said undertaking as sole surety thereon. The plaintiffs applied to the superior court for an order to strike from the files the said undertaking, because by reason of a stated defect in form it did not comply with the statutory requirements of such an undertaking, and because the surety was liable on a certain policy of insurance issued by it, so that said undertaking did not furnish plaintiffs additional security as required by law. By an order

made on December 28, 1934, said motion was granted. On the 3d day of January, 1935, appellants filed a new undertaking, this time in proper form, but with the same surety. On the next day the plaintiffs applied to the superior court for an order striking from the files the said second undertaking, and for an order directing the issuance of execution on the judgment. That court thereupon notified appellants that on January 7th it would grant said motion and order the issuance of the demanded execution. Appellants then applied to this court by petition for the writ of supersedeas. After due notice upon an order to show cause (with incidental temporary stay of execution), the said application was presented, argued by counsel for the respective parties, and is submitted for decision.

The alleged incapacity of the Central Surety & Insurance Company, if there be such incapacity, to act as surety on the stay bond, arises solely from the admitted fact that at the time of the accident in which Homer C. Parrett lost his life, there was in effect a certain "automobile liability" insurance policy, issued by said company to appellant Lenore V. Rix; and that by reason of its interest as such insurer, in the result of the action, the company was active in the defense of the action during the trial thereof. No question is raised, challenging the solvency, or general qualifications of the company to act as surety on undertakings required by law in this state.

[1, 2] We are of the opinion that in this proceeding it is not necessary to decide the question presented by counsel, relating to the error, or the want of error, in the order of December 28th, or in the proposed order directing the issuance of execution. We are satisfied that appellants have in good faith attempted to comply with the law, in offering said company as its surety on the stay bond as filed. This being so, and it appearing nevertheless that in the absence of a writ of supersedeas the superior court will issue execution on the judgment, we deem it appropriate that the application for supersedeas should be granted. Appellant is not entitled to this writ as a matter of right, "but we may properly, in the exercise of a sound discretion, grant * * * the writ upon such terms as will be just and will adequately protect the rights of the respondent." *Segarini v. Bargagliotti*, 193 Cal. 538, 226 P. 2; *Foster v. Fernandes*, 200 Cal. 274, 252 P. 726. We may assume (without deciding), that the sure-

ty offered on the statutory undertaking filed in the superior court was neither incompetent nor disqualified to be such surety on that undertaking. Yet it does not follow that in the exercise of the discretion of this court in granting a writ of supersedeas, we should compel respondents to accept the same surety, whose competency in relation to this case is seriously questioned by them for reasons of such force that they appear to be offered in good faith equal to that of appellants. We may exclude such surety here, without disturbing any vested right either of appellants or of such proposed surety.

It is ordered that upon the filing by petitioners, with the clerk of this court, within fifteen days from the entry of this order, of a good and sufficient undertaking on appeal in the sum of \$10,000, conditioned as required by law, with sufficient surety or sureties other than said Central Surety & Insurance Company, and which shall have been first approved by the presiding judge of the superior court of Los Angeles county, at a hearing upon five days' notice to respondents, a writ shall issue as prayed for herein. It is further ordered that in the meantime, during said period of fifteen days, execution of said judgment of the superior court be stayed.

We concur: HOUSER, J.; YORK, J.



4 Cal.App.2d 688

Ex parte DOWELL

Cr. 2537.

District Court of Appeal, Second District,
Division 2, California.

Feb. 21, 1935.

1. Habeas corpus ☞14

Where divorce decree providing for custody of child did not prohibit removal of child from state in which decree was issued, wife's action in removing child to California was not of itself an illegal act, as regards husband's right to habeas corpus after modification of decree to give him exclusive custody of child.

2. Habeas corpus ☞85(1)

Where divorced wife and child reside legally in California, it will be presumed, in

habeas corpus proceeding brought by husband, that mother is in rightful possession of child.

3. Habeas corpus ☞14

Unless child in mother's custody is in some imminent danger as to its safety, health, morals, or reasonable comfort, habeas corpus by father is not proper remedy to try issue of right to custody of child.

Proceeding by Niram W. Dowell against Charlotte L. Dowell for a writ of habeas corpus as to Peggy Joan Dowell, a minor.

Writ discharged.

Gwartney & Gall, of Los Angeles, for petitioner.

F. B. Mullendore and W. O. Graf, both of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Niram W. Dowell, petitioner, and Charlotte L. Dowell, respondent, heretofore were husband and wife, but prior to the filing of this petition they were divorced and now are. Peggy Joan Dowell, aged nine years, is the adopted child of petitioner and respondent.

The decree of divorce provided that the mother should have the care and custody of the child, except that the father should have such care and custody for two consecutive months of each summer and that the father should have the privilege of visiting with the child at any reasonable time.

The mother removed to Los Angeles, Cal., about August, 1930, bringing said child with her and has resided there with the child ever since. During the year 1931 the court that granted the divorce and custody decree upon the action of petitioner made an order modifying the decree and gave the exclusive custody of the child to the father. The respondent claims that she was never served with any process concerning such hearing and that the said modification was entirely without the jurisdiction of the court making it.

In these circumstances petitioner requests us to issue our writ of habeas corpus to respondent and that she produce the said child and deliver it over to petitioner under such modified decree.

[1-3] It will be noted that the original decree did not prohibit the removal of the child from the state issuing the decree. We think, therefore, the act of respondent in removing the child to California was not of itself an illegal act. The respondent and the child re-

siding legally in California, it will be presumed that the mother is in the rightful possession of her female child of tender years, and we do not understand that the writ of habeas corpus can be used to try an issue raised thereon. The trial courts are open for that purpose. If the child were in some imminent danger as to its safety, health, morals, or reasonable comfort, we think the writ the proper remedy, but not otherwise in the circumstances of this cause.

With this view of the law we appointed our referee to examine into such later issue, limited to the moral and economic fitness of respondent to have the care and custody of the child, and after hearing all of the testimony on either side thereon, said referee reported to us: "There was no evidence of, and the referee finds that there is no moral or economic unfitness of the said Charlotte Gooding (respondent under her present married name) which would render her an improper person to have the custody of the child at this time." This report has been accepted and adopted by this court. We have carefully examined the authorities submitted on behalf of petitioner, but we deem it of no particular value to any one to analyze them herein, as we have given our view of the matter in the body of the opinion.

The writ of habeas corpus is discharged.

I concur: CRAIL, J.



4 Cal.App.2d 639

THOMSEN v. CULVER CITY MOTOR CO.,
Inc., et al.

SAME v. KERRIGAN et al.

KERRIGAN v. THOMSEN.

Civ. 8738, 8739, 8737.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1935.

Hearing Denied by Supreme Court
April 18, 1935.

1. Trover and conversion ⇨40(4)

Evidence that automobile sales corporation's president, executing on its behalf note for amount loaned it by bank and bills of sale of automobiles as security, sold automobiles

as individual, without procuring releases from bank or accounting thereto for proceeds, and agreed to report to bank each sale and give it new bill of sale for each automobile sold or reduce amount of note at time of giving renewal note, *held* insufficient to sustain trial court's finding that bank's security was converted.

2. Corporations ⇨306

Corporation directors and officers, not participating in, or guilty of culpable negligence in allowing, commission of torts by corporation, are not liable therefor.

3. Corporations ⇨306

Corporation directors, not shown to have had anything to do with corporation's books or accounts, any dealings with bank to which automobile sales corporation gave bills of sale of automobiles as security for loans, or knowledge of corporation president's agreement to substitute new bills of sale for automobiles sold to its customers, *held* not liable to bank for conversion of its security.

4. Trover and conversion ⇨7

Conversion of personalty by one authorized to sell it for another does not result from former's failure to pay over proceeds.

5. Trover and conversion ⇨9(1)

Refusal to comply with demand for possession of personalty does not amount to conversion thereof, where compliance is impossible.

6. Trover and conversion ⇨9(3)

Automobile sales corporation's authority to make sales to customers after its president executed note to bank for loans and bills of sale as security on corporation's behalf was not terminated by mere maturity of note, in absence of demand for possession of automobiles, so that subsequent sales thereof did not constitute conversion of bank's property.

7. Trover and conversion ⇨10

Bank, making no effort to take possession of automobiles covered by bills of sale, given it as security for loans to dealer, and not revoking latter's authority to sell automobiles still undisposed of, notwithstanding bank's knowledge of sale of two automobiles and failure to make payments on note, could not sue for conversion of automobiles by sale of remaining ones.

8. Trover and conversion ⇨16

Lien will not support trover, unless lienholder had possession or right to immediate possession of property at time of conversion.

9. Set-off and counterclaim ⇨23

Bank *held* entitled to assert demand for damages for conversion of automobiles, sold

by corporation president after executing bills of sale thereof to bank as security for loans to corporation, by way of counterclaim in action by corporation's creditor against bank as trustee for creditors to recover plaintiff's share of proceeds of execution sale, any claim tending to diminish or defeat plaintiff's recovery and existing between parties as to whom several judgment may be had being proper subject of counterclaim (Code Civ. Proc. § 438).

10. Corporations ⇨306, 423

Bank did not waive its claim against corporation and directors thereof for value of automobiles, sold by its president after executing bills of sale thereof to bank as security for loans, for which he gave his note, when assignee of note recovered and satisfied judgment thereon, where bank merely received custody of proceeds of execution sale for disbursement to corporation's creditors.

11. Estoppel ⇨110

Waiver of claims sued on is affirmative defense, which must be pleaded.

12. Corporations ⇨306

Contract for distribution of proceeds of execution sale under judgment against corporation's president on his note among corporation's creditors by payee bank as trustee for them and execution of note by president for difference between amount of judgment and bank's share of proceeds held not to excuse glyng of latter note until bank completed distribution of funds.

13. Action ⇨59

Only one set of findings and one judgment should be rendered in consolidated cases.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Actions by H. A. Thomsen, as receiver of the First National Bank of Culver City, substituted for Martha Westman, against the Culver City Motor Company, Inc., and others, and against James E. Kerrigan and others, and action by Charles Kerrigan against H. A. Thomsen, as receiver, who filed a counterclaim. From judgments for the receiver, defendants in the first two actions and plaintiff in the third action appeal.

Affirmed in part and reversed in part.

D. Chase Rich, of Los Angeles, for appellants.

Andrew J. Copp, Jr., of Los Angeles, for respondents.

SHINN, Justice pro tem.

Appeals are presented in each of three cases which were consolidated and tried upon the same evidence, separate judgments having been rendered. They arose out of a series of transactions briefly outlined as follows:

Culver City Motor Company, Inc., was a corporation, the stock of which, except for three qualifying shares, was owned by J. E. Kerrigan; Charles H. Kerrigan was vice president, G. A. Lang, secretary, and L. Walker was the remaining director and assistant secretary. The company was dealing in automobiles. In August, 1929, it made a transfer of all its assets to J. E. Kerrigan in consideration of his assuming its liabilities; Kerrigan continued to carry on the business under the fictitious name of Culver City Motor Company. The corporation continued in existence with the same officers and directors. It was indebted to First National Bank of Culver City and on November 1, 1929, gave a sixty-day renewal note to the bank for \$5,000 signed by J. E. Kerrigan, as president. It also gave the bank eight bills of sale, each covering one new automobile, as security for the debt, retaining possession of the cars, which it afterwards sold in the usual course of business. The money received from these sales was deposited in the bank to the account of Culver City Motor Company (not the corporation) and was used in the business, no part being paid to the bank. After the sale of the cars, the bank demanded possession of the cars or payment therefor, receiving neither. The bank assigned to Westman the note and also its claims to the cars or their value for the purpose of collection. Suit was brought by the assignee on the note and the assets of the business were attached. Judgment was confessed in this action for \$5,330, and execution was issued thereon. A purchaser was found for the business who paid \$8,118.64 at the execution sale. An agreement was entered into between the bank, J. E. Kerrigan, doing business as Culver City Motor Company, and the purchaser, under which the proceeds of the sale were turned over to the bank as trustee for creditors of the business whose claims amounted to some \$26,000, to be distributed ratably between them. By this agreement J. E. Kerrigan also promised to give the bank his note for the amount of the judgment that remained unpaid after applying thereon the bank's share of the distribution, this balance amounting to \$3,899.

C. H. Kerrigan was a creditor of the business in the amount of \$9,000. His share of the creditors' fund amounted to \$2,430. The bank refused to pay C. H. Kerrigan, who sued on his claim as a creditor; the bank filed a counterclaim in damages, and Westman brought suit against the corporation, both Kerrigans, and Lang, in which, as in the counterclaim, recovery was sought in the sum of \$6,000 for conversion of the cars. No cars were recovered from any of the purchasers, nor was any court action taken for that purpose. J. E. Kerrigan refused to execute his note for the balance of the judgment and Westman sued on the agreement, to recover the amount for which the note was to be given.

Upon a trial of the issues the court decided that the automobiles had been converted and rendered judgment against the corporation, J. E. Kerrigan, C. H. Kerrigan, and Lang in the amount of \$4,000 damages; the counterclaim of the bank was upheld and the damages for conversion found to have been sustained by the bank were offset against the claim of C. H. Kerrigan against the bank, and Westman was given judgment in the remaining action against J. E. Kerrigan for the amount unpaid on the original judgment, for which he had agreed to give his note. Charles H. Kerrigan appeals from the judgment denying him recovery on his creditor's claim; J. E. Kerrigan appeals from the judgment rendered against him under the agreement, and all of the defendants appeal from the judgment in the action for conversion.

Some twenty of the findings are challenged by appellants as being unsupported by the evidence. The criticisms found in the briefs of appellants are of such a general nature and the references to the transcript so meager that we are unable to tell in most instances what points are urged or where the evidence relating to the findings may be found. We shall therefore discuss only the findings concerning which argument is presented in accordance with the rules, these points being sufficient for the proper disposition of the appeals.

[1] The judgment offsetting the bank's claim for damages against the creditor's claim of C. H. Kerrigan, and the judgment against the corporation and the directors, are based upon findings that the bank's security was converted. The appellants in these cases maintain that the evidence is insufficient to sustain these findings, and we have reached the conclusion that this contention

must be upheld. The evidence shows that for a number of years the corporation had been doing business with the bank, borrowing money and giving bills of sale of automobiles as security. The corporation always retained possession of the cars and sold them as customers were found. From time to time, the bank would make a check of the cars on hand and would either receive additional security or payment on account of the indebtedness when, through sales, the security had become inadequate. The practice never existed of procuring releases from the bank before the cars were sold, nor did the bank ever require that the money received from sales be accounted for as received. When the renewal note was given November 1, 1929, an officer of the bank exacted an agreement from J. E. Kerrigan that each sale should be reported and a new bill of sale be given in substitution for the one covering the car sold or that the note should be reduced; no specific sum was agreed upon that should be paid for the sale of a single car. While, as stated, the bills of sale and the note were executed on behalf of the corporation by J. E. Kerrigan as president, he at the same time was carrying on the business as an individual and it does not appear that the corporation sold any of the cars or received any of the money. The evidence is silent as to any specific uses that were made of the money, but insufficient to warrant an assumption that the corporation received it.

[2, 3] C. H. Kerrigan is the son of J. E. Kerrigan and made his home with the latter. He had been a director for a number of years and vice-president for less than a year. His work was in the parts and service departments and he was not a salesman. Lang is shown to have been a director and secretary. There was evidence that C. H. Kerrigan knew the bank held the bills of sale and that it was a creditor of the corporation; there was no such evidence as to Lang, although he acted as a director in authorizing the officers to borrow money from the bank. Neither he nor C. H. Kerrigan is shown to have had anything to do with the books or accounts of the corporation or to have had any dealings with the bank, nor is there evidence that either of them had knowledge of the agreement of J. E. Kerrigan with the bank regarding the substitution of bills of sale, which, as noted, was a departure from the previous method of doing business. The directors apparently did not hold any meetings after the transfer of the assets to J. E. Kerrigan. C. H. Kerrigan testified

that he believed the corporation had ceased to do business; Lang was not called as a witness. J. E. Kerrigan sold the eight cars, C. H. Kerrigan having negotiated the sale of three of them.

While it is true, of course, that directors and officers of a corporation are liable equally with the corporation for its torts in which they participate, it is equally true that if they do not participate therein, and if they are guilty of no culpable negligence in allowing the commission of the wrongful acts, they are not liable. We think the evidence falls far short of showing a liability on the part of directors C. H. Kerrigan and Lang, even if it should be assumed that the corporation made the sales and received the proceeds thereof.

The case does not fall within the rules stated in *Vujacich v. Southern Commercial Company*, 21 Cal. App. 439, 132 P. 80, or *McClory v. Dodge*, 117 Cal. App. 148, 4 P.(2d) 223, cited by respondent. In the first of these cases it was held that directors would be presumed to know of transactions openly and continuously carried on by the corporation in which it made a practice of receiving deposits from laborers for safe-keeping and using the money for its own purposes. In *McClory v. Dodge*, directors were held liable where they sold plaintiff's stock, which he had turned over to them to be exchanged for stock of their corporation, and used the money for the corporation. Although it was said that they would be presumed to know the conditions under which the corporation became possessed of plaintiff's property, a statement fully justified by the facts of the case, it was also pointed out that the directors had actual knowledge of those facts and that plaintiff had not parted with title to his stock.

[4-8] It appears that directors C. H. Kerrigan and Lang did not have knowledge of and did not participate in any wrongful act, nor was either of them at fault in the performance of his duties as director or officer. No wrong was committed in the mere sale of the cars. If J. E. Kerrigan did not keep his agreement with the bank, the other defendants were not to blame because they had no part in it. We do not believe, furthermore, that there was a conversion of the bank's property at all. The bank gave authority to sell the cars—in fact, expected them to be sold. Where one is authorized to sell personal property for another, a conversion of the property does not result from a failure to pay over the proceeds. 65 Cor. Jur. 34. The cor-

poration, moreover, did not sell the cars; they were sold by J. E. Kerrigan, doing business as Culver City Motor Company. There was no breach of duty toward the bank in making the sales, although there was a violation of the agreement of J. E. Kerrigan to replenish the security or reduce the note when sales were made. By the terms of the collateral security note the bank had a right to take possession of the cars and sell and deliver them in case of default in meeting the note, which default occurred on January 2, 1930, but the bank made no demand for possession until after the cars had been sold. If the cars had then been in the possession of the defendants and had they persistently refused to surrender them, a conversion would have occurred, but it did not result from the refusal to meet the demand that was made. A refusal to comply with a demand for possession of personal property does not amount to a conversion thereof where at the time of the demand it is impossible to comply therewith. *Steele v. Marsicano*, 102 Cal. 666, 36 P. 920. We are not unmindful of the fact that as each car was sold the sale should have been reported and that J. E. Kerrigan's agreement with the bank required that the latter be protected, but the bank did not prove that substitution of bills of sale of different cars or payment on account of the note were terms to be complied with as a condition to the right to make sales, nor was the authority to make sales terminated by the mere maturity of the note in the absence of a demand for possession. Mr. Ahern, an employee of the bank, made a check of the cars on hand in the latter part of January, 1930; at that time two of the eight cars had been disposed of. The bank, even with knowledge of this fact, and knowing that no payment had been made on the note, made no effort to take possession of the cars and did not revoke J. E. Kerrigan's authority to sell the remaining cars. It follows that J. E. Kerrigan had a right to possession of the cars at the time they were sold, by reason of the acquiescence of the bank therein and its failure to demand possession, and as, admittedly, the bank was not the owner but held only a lien, it therefore could sue in conversion only in case the sales deprived it of a then existing right to immediate possession. A lien will not support trover unless at the time of the conversion the lienholder had possession or the right to immediate possession of the property. 65 Cor. Jur. 63. No conversion was established as against the defendant corporation or its directors. If directors C.

H. Kerrigan and Lang were not liable for the alleged conversion, there would seem to be no object in seeking a judgment against the corporation and J. E. Kerrigan. The assignee of the bank, as will hereinafter appear, has a judgment against J. E. Kerrigan for the full balance of the latter's debt to the bank. The record furnishes no good reason for believing that the bank would suffer any prejudice in failing to obtain another judgment against the corporation and J. E. Kerrigan for the amount of the same debt under the name of damages.

[9] Plaintiff C. H. Kerrigan, in his action against the bank, made a motion to dismiss the counterclaim of the bank upon the ground that the facts stated therein did not constitute a demand that could be asserted as a counterclaim. This motion was properly denied. By an amendment to section 438 of the Code of Civil Procedure in 1927 (St. 1927, p. 1620), the scope of permissible counterclaims has been largely extended. It is no longer necessary that the counterclaim be one arising out of the same transaction as the one alleged by plaintiff or that it relate to the subject of the action or that it be based on contract. All that is required is that it be one which tends to diminish or defeat plaintiff's recovery and that the claim exists between parties as to whom a several judgment might be had in the action.

In *Terry Trading Corp. v. Barsky*, 210 Cal. 428, 292 P. 474, 477, it was said: "All of the other limitations were abolished by this amendment, and an intent on the part of the Legislature to avoid multiplicity of suits and to have all conflicting claims between the parties settled in a single action was most clearly manifested."

The counterclaim fully meets the requirements of the section as amended, since the effect would be, if defendant prevailed thereunder, to defeat plaintiff's claim in full and to award defendant a money judgment against plaintiff.

[10, 11] Appellants also claim that the bank waived all claims based upon the security when its assignee Westman recovered judgment on the note and satisfied the judgment. No plea of waiver is found in the pleadings and we think none was shown. At the time the action was brought on the note, the security had been lost to the bank. It claimed the right to recover the value of the security from persons other than the maker and guarantor of the note. The satisfaction of judgment did not satisfy the bank's claims. The bank did not receive payment

but only custody of the funds to be disbursed to creditors. Waiver is an affirmative defense that must be pleaded. *Wienke v. Smith*, 179 Cal. 220, 176 P. 42. In *Cross v. Superior Court*, 83 Cal. App. 144, 256 P. 453, 454, the rule is stated thus: "Waiver can result only from an intentional relinquishment of a known right, and that it may be inferred only where the conduct of the party has resulted in a prejudice to the rights of his opponent caused by an honest belief that the waiver was intended." There is no merit in this contention.

[12] In appeal No. 8739, plaintiff Westman recovered judgment against James E. Kerrigan for \$3,822.59, the unpaid balance of the judgment in favor of Westman rendered in the suit on the note. The sole point urged for reversal of this judgment is that defendant was excused from compliance with his agreement because of the failure on the part of the bank to perform its obligations under the agreement sued on. This agreement provided that the proceeds of the execution sale would be paid over to the bank. The judgment amounted to \$5,330 and the amount received by the bank after deducting costs was \$7,330.37. This sum the bank agreed to prorate among the creditors whose claims should be filed in the escrow. It received as its share of this distribution the sum of \$1,431, leaving an unpaid balance of \$3,899. The agreement provided as follows: "The party of the first part agrees that upon receipt of said sums of money it will immediately make distribution thereof to all of the creditors of the party of the second part who have filed claims to date against the party of the second part in a certain escrow now pending in the California Bank, National City Branch, Escrow No. 4101, pro rata, each creditor to receive a proportionate share of his claim as the total sums of money to be received shall bear to the full aggregate total of the claims now on file with said bank.

"It is agreed that prior to said distribution the party of the first part shall be entitled to pay to itself all reasonable costs expended up to the present time in the prosecution of the said action and to be expended by reason of said sale in said Superior Court action numbered 295567.

"The party of the second part further agrees to execute and deliver to the party of the first part, or order, his promissory note, payable on demand, in the usual form, waiving demand, notice, protest, diligence, etc., for the full difference between what the par-

ty of the first part shall be entitled to receive under the proportionate distribution of said funds and the amount of \$5,330.00.

"In the event any creditor of the party of the second part shall not receive his pro-rata dividend and payment from the party of the first part, due to its neglect and/or fault, within ten days after the party of the first part shall have received said moneys, and after said date shall file suit against the party of the first part for the recovery of said sums due, the party of the first part agrees to pay a reasonable attorneys' fee in any action commenced and succeeded in by said creditor."

Defendant based his refusal to execute the note as agreed upon the failure to pay the claim of Charles H. Kerrigan in the amount of \$2,430 and the alleged wrongful deduction of some smaller sums. He now urges that he should have been excused from giving his note until the bank had fully complied with its agreement to disburse the funds. Upon the other hand, it is claimed by respondent that the promise to give the note was not a covenant dependent upon performance by the bank. A fair reading of the agreement leads us to the conclusion that the note was to be given as soon as it was ascertained what amount would be payable to the bank from the fund. This amount was ascertained and paid and demand was made on defendant for the note, following which the assignee of the bank sued and recovered judgment under the agreement.

Appellant cites cases in which the covenants are mutual and dependent or where performance by one of the contracting parties is made a condition precedent to performance by the other. The covenants involved here are not dependent. There is no stipulation in the agreement that the note was to be given after the creditors had been paid; the debt to be evidenced by the note already existed. The only apparent reason for delaying its making was the necessity for arriving at the proper amount, which could not be known until the creditors had

filed their claims. This contract, like any other, should receive a construction consistent with its terms and with the intention of the parties. So construed, it does not excuse the giving of the note until the bank had completed its distribution of the funds. The authorities amply support such a construction as would treat the respective covenants to be independent of each other. *Deacon v. Blodget*, 111 Cal. 416, 44 P. 159; *Pacific Mill Co. v. Inman, Poulsen & Co.*, 46 Or. 352, 353, 80 P. 424; *Union Pac. R. Co. v. Travelers' Ins. Co. (C. C. A.)* 83 F. 676; *Front Street, etc., R. Co. v. Butler*, 50 Cal. 574.

[13] It follows that the judgment in this case should be affirmed.

It will be observed that in appeal No. 8737, the action of Charles H. Kerrigan against the bank, the findings establish the fact that plaintiff therein was a creditor of the business to the extent of \$9,000 and that under the judgment he was awarded nothing because of the offset allowed the bank on its counterclaim. In appeal No. 8738, the conversion action, plaintiff Westman recovered judgment for \$4,000 against Charles H. Kerrigan as well as against the other defendants. Had the plaintiff in that action been entitled to recover at all, the judgment against C. H. Kerrigan should have been limited to the excess of the value of the property above the amount admittedly due him as a creditor. Other inconsistencies, as well, such as the assertion of its claim for damages in one action by way of counterclaim by the bank, while the same claim is prosecuted in another action by its assignee, show the wisdom of the rule that in consolidated cases, such as these, one set of findings and one judgment only should be rendered.

The judgment in appeal No. 8739 is affirmed; the judgments in appeals Nos. 8737 and 8738 are reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

STEVENS v. PLUMAS EUREKA ANNEX
MINING CO. et al.

Sac. 4883.

Supreme Court of California.

Feb. 25, 1935.

Rehearing Denied March 25, 1935.

1. Mortgages ⇨356

Facts held to show prima facie that trustee duly posted notices of time and place of sale under trust deed, as required by statute.

2. Mortgages ⇨353

Grantor of trust deed waived any defect in notice of sale under trust deed, where grantor had notice, attended sale, tendered bid, and tendered amount grantor deemed sufficient to cover amount due.

3. Mortgages ⇨369(3)

Inadequacy of price, however gross, is not sufficient ground for setting aside trustee's sale legally made, in absence of proof of some element of fraud, unfairness, or oppression which brought about inadequacy of price.

4. Evidence ⇨83(1)

Court must assume that trustee's sale was free from fraud, in absence of contrary evidence.

In Bank.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Allie Stevens against the Plumas Eureka Annex Mining Company and others, wherein named defendant answered seeking affirmative relief. Judgment for plaintiff, and named defendant appeals.

Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

Young & McMillan, of Quincy (Green & Lunsford, of Reno, Nev., of counsel), for respondent.

WASTE, Chief Justice.

Plumas Eureka Annex Mining Company made and executed in writing a lease agreement by which there was leased to one Bourey mining property in Plumas county. In and by the terms of the agreement, a sum of \$10,000 was advanced, which amount defendant mining company agreed to pay. At the same time there was executed a deed of trust made by the company as grantor, F. J. Behneman and L. D. Byrne as trustees, and J. A. Talbot as beneficiary, to secure the performance of the terms and conditions of

the lease, which had, in the meantime, been assigned and transferred by Bourey to said Talbot. Talbot thereafter filed a voluntary petition in bankruptcy, listing among his assets the deed of trust executed by the mining company, which deed of trust was sold by order of court, through the trustee in bankruptcy, and was purchased by plaintiff, respondent here, for the sum of \$3,999.

The new owner of the deed of trust gave, filed, and recorded a notice of default in the performance of the terms and conditions of the lease and option secured by the deed of trust, together with an election to sell the property. The mining company thereupon commenced an action against the respondent in the United States District Court, praying for a judgment canceling, annulling, and setting aside the deed of trust, and procured a temporary injunction restraining the trustees from selling the property under its terms. On the cause being brought to trial, the court dismissed the case and dissolved the injunction. By reason of the injunction, the time fixed for the sale of the property had expired. The substituted trustee therefore again advertised the property for sale, and the mining company commenced an action in the superior court of the county of Plumas, in which county the property was located, and obtained a restraining order enjoining the trustee from proceeding with the sale. On return of the order to show cause, the preliminary injunction was dissolved, and the action dismissed. The property was then sold to the respondent. The appellant continued in possession of the property, and this action to recover possession was thereupon brought by the respondent. The defendant answered, seeking affirmative relief, and praying that the sale of the property under notice of default, as provided in the deed of trust, be set aside and canceled. Judgment was entered for the plaintiff, from which the defendant mining company appeals.

[1, 2] Appellant's first contention is that the plaintiff failed to prove a valid trustee's sale, in that there was no proof of posting notices of the time and place of the sale of the property, as required by the statute prescribing and regulating such matters. It is somewhat difficult to ascertain if this question was raised and the point relied upon at the trial. The answer of appellant admits that the trustee "caused notice of sale of said property to be advertised and the said property was advertised for sale." There appear in the record in the statement of sums

due, following the sale under the deed of trust, certain items for "posting notice on the property." In the trustee's deed to respondent is the declaration that the trustee "did heretofore duly make and cause to be published, in the manner, and for the time required by law and the provisions of said deed of trust, a notice of sale of said trust. * * *" We are of the view that the recital in the deed from trustee to purchaser at the sale, coupled with the other facts in the record, is sufficient to show prima facie that the trustee duly gave notice of sale as required by law and the provisions of the trust deed under the terms of which the sale was had. This is especially so when, as here, the trust deed states that its recitals of default, and of publication and posting of notice of sale, shall be conclusive proof of the facts stated in the trustee's deed; and no evidence is offered to show that notice was not posted. *Jose Realty Co. v. Pavlicevich*, 164 Cal. 613, 130 P. 15; *Mersfelder v. Spring*, 139 Cal. 593, 73 P. 452. Furthermore, if there was a defect in the notice of sale (which has not been shown), we are of the view that it was waived by appellant when it had notice, attended the sale, and, according to the record, tendered a bid, and also tendered an amount it deemed sufficient to cover the amount due.

[3] Appellant seeks a reversal of the judgment because of fraud claimed to have been practiced against it in the proceedings leading to and the conduct of the sale itself. It was claimed at the argument and is asserted in appellant's brief, that the mining property "was worth at least the sum of \$180,000." The evidence on the value of the property is contradictory, and the evidence on which such an assertion is attempted to be based appears to be very largely speculative. In California, it is a settled rule that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price. *David v. Frost*, 122 Cal. App. 750, 10 P.(2d) 504; *Baldwin v. Brown*, 193 Cal. 345, 224 P. 462. We find no such element in this case.

[4] We find no substantial (in fact, not any) evidence to support appellant's contention that the trustee making the sale was guilty of fraud, or was so biased and prejudiced against appellant as to conduct the sale wholly in favor of and for the sole ben-

efit and interest of the plaintiff. In the absence of such evidence, we must assume that the sale was free from fraud. The trustee, who was substituted for the trustees first designated in the deed of trust, was the attorney for the plaintiff. He appears to have strictly protected the interests of his client at all stages. The whole transaction, the proceedings leading to, and the sale, were adversary. Appellant was no doubt badly in need of funds. It could not meet the demands of the deed of trust, or raise the amount required to prevent the sale to plaintiff. It must suffer the consequences.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.; SIENK, J.



2 Cal.2d 470

In re CROSBY'S ESTATE.

YOELL v. CROSBY et al.

S. F. 15018.

Supreme Court of California.

Feb. 21, 1935.

Rehearing Denied March 21, 1935.

1. Exemptions ⇨4

Construction given exemption statute must be reasonable and not one which would pervert benevolent design of statute and enable gross frauds to be perpetrated under color of law (Code Civ. Proc. § 690).

2. Exemptions ⇨50(1)

Exempt property of decedent passing to persons designated in statute is free, not only from decedent's debts, but also from debts of persons so designated (Probate Code, § 660).

3. Exemptions ⇨50(1)

Exemption of insurance proceeds in favor of decedent's spouse and minor children is limited to surviving spouse and family of insured (Code Civ. Proc. § 690, subd. 18; Probate Code, § 660).

4. Exemptions ⇨50(1)

Decedent's second husband held not entitled to have set aside to him as property exempt from execution proceeds of policy on first husband's life of which decedent was

insured (Code Civ. Proc. § 690, subd. 18; Probate Code, § 660).

5. Exemptions 127

Residuary legatee, though not of family of insured or decedent, was entitled to oppose attempt of decedent's second husband to improperly set aside nonexempt proceeds of policy on life of decedent's first husband (Code Civ. Proc. § 690, subd. 18; Probate Code, § 660).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Lilly Crosby, also known as Lilly A. Crosby, also known as Lilly Klitgaard, also known as Lilly Klitgaard Crosby, also known as Lilly A. Stad, also known as Lilly A. Klitgaard, deceased. Petition by Sverre Crosby to have set aside to him as exempt from execution property including proceeds of a life insurance policy of which deceased was beneficiary, opposed by Rodney A. Yoell, a legatee and devisee under the last will and testament of Lilly Crosby, deceased. From an order granting the petition and setting aside the sum of \$7,847.55 of the proceeds of the insurance policy, Rodney A. Yoell appeals.

Reversed with directions.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, for appellant.

Frank J. Fontes, of San Francisco, for respondent Sverre Crosby.

Bronson, Bronson & Slaven, of San Francisco, for respondent E. D. Bronson, etc.

Ford & Johnson, of San Francisco, for respondents Dagmar Soules, Norman Christian, Thelma Shaughnessy.

WASTE, Chief Justice.

The residuary legatee and devisee under the last will and testament of Lilly Crosby, deceased, prosecutes this appeal from an order of the probate court setting aside to the second and surviving husband of the decedent the sum of \$7,847.55, representing the proceeds of a life insurance policy issued on the life of the decedent's first husband.

On March 25, 1927, the Continental Life Insurance Company issued a policy of life insurance on the life of C. F. N. Klitgaard. Under the terms of the policy, the insurer, upon receipt of due proof of the death of the insured, agreed to pay to the wife of the insured, the decedent above named, as benefi-

ciary under the policy, a stipulated sum per month until 240 monthly installments, aggregating \$12,000, had been paid. The insured predeceased the beneficiary. No premiums were payable on the policy subsequent to the death of the insured and none was thereafter paid. The beneficiary later married Sverre Crosby, one of the respondents herein. Upon the subsequent death of the beneficiary, under the policy, there was paid to the executor of her estate by the insurer the commuted value of the monthly installments under the policy in the sum of \$7,999.98. Thereafter the surviving second husband petitioned the probate court to set aside to him, as property by law exempt from execution, all household furniture, clothing, personal effects, and jewelry, concerning which there is no dispute, and the proceeds of said life insurance policy. The petition, as to the insurance proceeds, was based on the provisions of subdivision 18 of section 690 of the Code of Civil Procedure and section 660 of the Probate Code. The residuary legatee opposed the petition contending that the proceeds of the policy did not come within the purview of the cited Code sections and were not therefore exempt from execution. After hearing, the probate court made its order granting the petition and setting aside the sum of \$7,847.55, which sum represents that proportion of the then total commuted value of the policy which an annual premium of \$500 bears to the annual premium of \$533.85, payable under the policy. This appeal followed.

So far as material here, section 690 of the Code of Civil Procedure exempts from execution or attachment "all moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars, and if they exceed that sum a like exemption shall exist which shall bear the same proportion to the moneys, benefits, privileges, and immunities so accruing or growing out of such insurance that said five hundred dollars bears to the whole annual premiums paid."

Section 660 of the Probate Code provides that "the decedent's surviving spouse and minor children are entitled to remain in possession of the homestead, the wearing apparel of the family, the household furniture and other property of the decedent exempt from execution, until the inventory is filed. Thereupon, or at any subsequent time during the administration, the court, on petition therefor, may in its discretion set apart to the sur-

viving spouse, or, in case of his or her death, to the minor child or children of the decedent, all or any part of the property of the decedent exempt from execution. * * *

Briefly stated, this appeal presents the question whether the proceeds of a life insurance policy on the life of an insured who had paid all of the premiums therefor prior to his death, which proceeds were payable and paid in monthly installments to his widow during her life and a commuted balance to the executor of her will upon her death, are life insurance moneys to which her second husband, upon her death, is entitled as property exempt from execution under the above Code sections. The appellant contends that exemption statutes are primarily enacted for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence, and that the surviving second husband is a stranger to the life insurance on the life of the decedent's first husband, and a stranger to the family of said insured, and is not therefore entitled to claim the property for his support as property exempt from execution within the spirit and intent of the cited Code sections. Respondent, on the other hand, urges that the situation here presented falls within the letter of the foregoing Code sections and that the same should be literally construed and given full force and effect. The case appears to be one of first impression in this jurisdiction and an exhaustive research of the authorities has failed to bring to light any decision from other jurisdictions presenting the identical issue here confronting us. Certain cases have been uncovered, however, the reasoning of which will be helpful in the disposition of the present cause. They will be referred to in the course of our discussion.

[1] Preliminarily to a determination of the applicability of the above Code sections to this cause, and as an aid in the solution of that problem, it is essential to ascertain the purpose that underlies the adoption of exemption statutes. In *Re Estate of Millington*, 63 Cal. App. 498, 500, 218 P. 1022, 1023, it is stated that, "while exemption laws are to be liberally construed, the manifest purpose of their enactment must be kept in mind. 'Statutes exempting property from execution are enacted on the ground of public policy for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence.'" Substantially the same discussion appears in 12 California Jurisprudence 332, but it is therein added, upon citation of authority, that the construction

given such statutes must be a reasonable one and "not one which would pervert the benevolent design and enable gross frauds to be perpetrated under color of law." There can be no doubt that the exemption of insurance moneys constitutes a part of this same benevolent public policy. In 7 Cooley's Briefs on Insurance, 6508, the following appears: "All the statutes bearing on the exemption of life policies or their proceeds seem based on the theory that, in the absence of an expressed contrary intent, the object of an ordinary life insurance policy should be considered as the protection of insured's family after his death, and that this object and desire is laudable and in accordance with public policy."

[2] It is settled in this state, contrary to some jurisdictions, that exempt property passing to the persons designated in section 660, supra, is, by virtue of the provisions of that section, free not only from the debts of the decedent, but also from those of the persons so designated. *Holmes v. Marshall*, 145 Cal. 777, 79 P. 534, 69 L. R. A. 67, 104 Am. St. Rep. 86, 2 Ann. Cas. 88. In view of this, it must be conceded that upon the death of the insured, C. F. N. Klitgaard, the proceeds of the policy above referred to passing to his surviving widow, the decedent herein, were free from garnishment and execution not only for the debts of the insured, but also for the debts of the beneficiary. However, the fact that the proceeds of the policy, whether paid to the beneficiary in monthly installments or in a lump sum, were exempt property during her lifetime, should not cause the same, or the commuted value thereof upon her death, to remain exempt in the hands of her executor so as to cause the same to pass to her surviving second husband free from garnishment and execution. Any other conclusion would, in our opinion, extend the exemption, which, as we have seen, is to inure to the benefit of the insured's family, in this case the decedent, and not her surviving husband, far beyond the benevolent purpose for which it was intended.

[3, 4] Upon the death of the insured in the present case, the exemption was intended to and did apply in favor of his surviving widow, the decedent herein, but to continue such exemption beyond her lifetime and in favor of her second and surviving husband, who, of course, was not a member of the family of the insured, would be an unreasonable construction of the Code sections and would, in effect, "pervert the benevolent design" for which the exemption was created. That the exemption of insurance proceeds is to be lim-

ited to the surviving spouse or family of the insured is declared in *Re Estate of Pillsbury*, 175 Cal. 454, 166 P. 11, 3 A. L. R. 1396, wherein certain minor children of the insured-decedent, who had been adopted by their uncle pending administration on their father's estate, moved the probate court, through their guardian, to set aside to them as property exempt from execution the proceeds of certain life insurance policies issued on the life of their father. The decision, while declaring that the minors' rights as heirs of their father were fixed and determined as of the time of his death, and were not affected by their subsequent adoption, concludes, however, that by such adoption the minors then ceased to be of the family of the decedent and were not therefore entitled to have the proceeds of the life insurance policies, issued on the life of the decedent, their natural father, set aside to them as exempt property.

The decision in *Re Estate of Starr*, 183 Cal. 121, 123, 190 P. 625, is also authority for the conclusion that the exemption was intended to apply, as provided in the Code section, only to the surviving spouse of the assured, and if there be no surviving spouse, then to the minor children of the assured. In the cited case the assured left as his only heirs at law seven adult children. His sole estate consisted of a life insurance policy payable to his executors, administrators, and assigns. In settling the final account of the administratrix, the probate court refused her petition to distribute the same to the heirs at law and directed that it be applied in discharge pro tanto of a judgment debt. The administratrix and the heirs appealed. In discussing the pertinent exemption statute, the court held:

"The provisions of our Code applicable to the situation described are found in section 690 of the Code of Civil Procedure, subdivision 18 of which, in enumerating the kinds of property exempt from execution, specifies 'all moneys * * * accruing or in any manner growing out of any life insurance' policy, etc., if the annual premiums paid do not exceed \$500; and section 1465 of the same Code [now section 660, Probate Code], which declares that all exempt property may be set aside for the use of the surviving spouse, or, in case of his or her death, to the minor children of the decedent. There is no doubt that under these sections the policy was exempt from execution during the lifetime of the deceased, and the proceeds after his death. The difficulty that arises in this case results from the fact that there is no

express provision for the distribution of exempt property after the death of the debtor except in the case provided for in section 1465, Code of Civil Procedure. Here there was no one entitled to take the property under this provision. There was, therefore, no reason why this property should not be administered in the same manner as any other property belonging to the estate. The law requires that such property shall be applied first to the payment of the debts of the deceased, and after such payment shall be distributed to the heirs. The exemption was intended to apply to the decedent, and upon his death to the surviving spouse, and if there were no surviving spouse then to the minor children of the deceased."

In *re Tellier's Estate*, 210 Iowa, 20, 230 N. W. 545, 546, presented a situation necessitating as here, a determination of the extent of an exemption statute. There the statute (Code 1927, § 8776, par. 4) exempted the proceeds of a life insurance policy payable to the surviving widow of a decedent "from liability for all debts of such beneficiary contracted prior to the death of the assured." At the time of her death, the beneficiary, who was the surviving widow of the assured, left as her only estate \$2,000 derived from a policy on the life of her predeceased husband. The question involved was whether this sum remained, as during her lifetime, exempt from such debts as she had incurred prior to her husband's demise. The court declared that, "during the lifetime of the widow, the fund not only belonged to her, but it was exempt in her hands against her own debts contracted prior to the death of her husband. She could have disposed of the fund as she would in her lifetime. Whether she could have disposed of it by will we shall not anticipate. This resolves the problem to the final question: Did the exemption survive the debtor? Does the exemption inure to the benefit of her estate after her death? Does the exemption inure to the benefit of her heirs? We answered a like question in the negative quite recently in *Appanoose County v. Carson*, 210 Iowa, 801, 229 N. W. 152. For the reasons here indicated, we hold that the heirs take as heirs of the widow, and not otherwise, and that the exemption provided in her favor by paragraph 4, section 8776, ceased to operate at her death, and did not inure to the benefit of her heirs."

In limiting the exception to the persons designated in the Code section, *supra*, we give ample and full effect to the benign purpose of the Legislature. To extend it, as re-

spondent Crosby would have us do, to persons not designated in the section and not possessing the necessary connection with the insured's family, would readily result in an endless chain of unwarranted exemptions never contemplated by the legislative body.

[5] What we have said sufficiently disposes of this appeal and warrants the conclusion that the court below erred in setting aside to the respondent Crosby as property exempt from execution the sum of \$7,847.55, representing that proportion of the commuted value of the policy of insurance issued on the life of C. F. N. Klitgaard, which an annual premium of \$500 bears to the annual premium payable under the policy. Inasmuch as the respondent Crosby, as to the proceeds of this policy, is not a person entitled to claim the exemption thereof, it is immaterial for present purposes that the appellant and residuary legatee is not of the family of the assured or of the decedent herein. As residuary legatee under the will of the decedent herein, he may, of course, oppose any attempt to improperly set aside nonexempt property.

The order appealed from is reversed with directions to the court to proceed as herein outlined.

We concur: LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; THOMPSON, J.; SHENK, J.



2 Cal.2d 497

GUIDICI v. GUIDICI.

Sac. 4693.

Supreme Court of California.

Feb. 26, 1935.

1. Deeds ⇨211(1)

Evidence held sufficient to support finding that grantor was mentally incapable, due to protracted and excessive drinking of alcoholic liquors, to understand nature of act in signing and execution of deed warranting cancellation thereof.

2. Contracts ⇨92

Party who at time of making contract is completely intoxicated may avoid contract, notwithstanding his intoxication may have been caused by his voluntary act and not by other party's contrivance.

3. Deeds ⇨17(3)

Marriage of grantee to grantor held not valid consideration for execution of deed, where grantor was incapable of understanding his act in execution of deed due to his intoxication.

In Bank.

Appeal from Superior Court, Sierra County; Henry B. Neville, Judge.

Action by Q. C. Guidici against Nellie Malley Guidici. Judgment for plaintiff, and defendant appeals.

Affirmed.

N. J. Barry, of Reno, Nev., for appellant.

E. F. Lunsford and Green & Lunsford, all of Reno, Nev., for respondent.

PER CURIAM.

This action was instituted by the plaintiff to cancel and set aside a deed to certain real property situated in Sierra county, executed by him in favor of the defendant, on the ground, as alleged in the complaint, "that at the time of the making of said deed the plaintiff, due to his age and due to the fact of his protracted and excessive drinking of alcoholic liquors * * * was entirely incapable of understanding his act in the execution of said deed, and was possessed of a great weakness of mind and was subject to the imposition and undue influence of defendant." The court found this allegation of the complaint true, and further found that there was no consideration for the execution of said deed, and rendered judgment setting aside and canceling said deed. From this judgment the defendant has appealed, and in support of her appeal contends that the evidence is insufficient to support the findings of the trial court.

The evidence in the case shows that at the date of the execution of said deed the plaintiff was sixty years of age, and that he owned and resided upon a farm near Loyalton, Sierra county. He had purchased the farm in 1913, paying therefor the sum of \$16,000. He owned no other property, except a small amount of stock maintained on his farm at the date he executed said deed, and said real property was the sole source of his livelihood and sole means whereby he contributed to the support of his three children. He had been married some years before, but was divorced from his wife to whom was awarded the custody of their three minor children, to whose support the plaintiff had contributed the sum

of \$37.50 per month since the divorce. On the day the deed was executed, the plaintiff was driven in an automobile from his farm to Reno, Nev. In the automobile were the defendant and two other persons, close friends of defendant, one of whom was the driver of the automobile. The trip to Reno was undoubtedly taken for the purpose of the plaintiff and defendant being married in said city. On arriving at Reno and after considerable delay, the four persons met in the office of a lawyer for the purpose of having said deed prepared and executed. They found, however, that they had no description of the property to be conveyed. The lawyer suggested that they get married and have the deed executed later. The defendant objected, and refused to go on with the marriage ceremony until the deed was given. The party then returned to plaintiff's home for the purpose of getting a correct description of his land. After securing the same they retraced their steps to Reno, arriving in the evening about half past 8 o'clock and going directly to the lawyer's office. There the deed was prepared and executed. They then arranged with a justice of the peace, and the plaintiff and defendant were married about 9:30 the same evening. Earlier in the day they had secured a marriage license. After attending a picture show they returned to plaintiff's farm, where the plaintiff and defendant spent the night. They lived together as man and wife about ten days. They then occupied separate rooms for a short time when the plaintiff, on account of ill health, was forced to go to a hospital where he remained some weeks. A few days after the parties returned from Reno the plaintiff, on learning that defendant had a deed to his farm, demanded that she deliver up said deed to him, which she refused to do. The deed was dated November 12, 1930. This action was begun on February 14, 1931, soon after plaintiff's discharge from the hospital.

[1] The plaintiff testified that he had been drinking excessively for ten days to two weeks prior to the date of said deed, and that he was so under the influence of intoxicating liquor that he had no recollection whatever of any of the occurrences which transpired on the trip to Reno, and no remembrance of signing or delivering said deed, or even of getting married to the defendant. That the plaintiff had indulged excessively in intoxicating liquor for some two weeks immediately prior to the date of said deed is borne out by a number of witnesses. One witness, a neighbor and intimate acquaintance, said that

he saw the plaintiff six times during these two weeks and that on each occasion the plaintiff was drunk, that plaintiff asked him to ride with him, but he refused as he was afraid the plaintiff "would go into the ditch on account of his drunkenness." Plaintiff had whisky in his car and wine at his house. Another neighbor testified that he saw the plaintiff and defendant on November 7, 1930, at Reno; the plaintiff was staggering around and defendant was trying to put him in the car; plaintiff's condition was very low; he could hardly talk. The daughter of plaintiff saw him a few days before his marriage to defendant, and at that time "His eyes were stormy. I should judge that he had been drinking, or something, he acted nervous. He was driving down the street and he nearly ran over me." The cashier of the bank at Loyalton testified that he saw plaintiff two or three days before the deed was executed. He went down to the latter's house. Plaintiff was sitting in the front room with a quart jar of wine in a very drunken condition. He stayed a short time with plaintiff, during which time plaintiff not only drank all the wine in the quart jar, but he filled it up again and drank from the jar after it was refilled. He gave his opinion that plaintiff was at that time "wholly incapable of doing any business." Dr. Lavery, who attended plaintiff at the hospital during his sickness in January, 1931, said his symptoms were "restlessness and insomnia and unable to concentrate," and that his condition could have been due to alcoholism. He further stated that excessive and continuous drinking for a period of ten days to two weeks could often overthrow the judgment entirely. An eminent expert on nervous diseases, and a member of the faculty of Stanford Medical School, in answer to a hypothetical question involving the condition of the plaintiff at the time he executed said deed, stated: "I would say a man in that condition was not capable of conveying his property or transacting business. I would consider him incompetent and incapable, irresponsible." In addition to these witnesses, the notary who took plaintiff's acknowledgment to the deed, testified: "I asked him [plaintiff] if it was his signature and I don't remember if he said anything or not, and then I said, 'You acknowledge that as your free act and deed.' I said it kind of fast and he looked at me and did not say anything, and I don't think there was much said by anyone; his eyes indicated to me that he had signed the deed. I took it for granted that he had signed it."

Continuing, this witness further testified, in answer to questions asked of her:

"I thought he acted kind of stunned, but I thought it was because he was a foreigner and could not understand English very well.
* * *

"Q. You say he looked dazed? A. Yes, and kind of stupid; the kind of—that is, he struck me as being dazed and kind of stupid.
* * * He acted kind of blank."

[2] All this evidence, aside from the testimony of the plaintiff, is corroborative of the evidence given by the plaintiff that at the time of signing said deed he was in such a state of mind, due to long and excessive drinking of intoxicating liquor, that he did not know what he was doing, and that he had no recollection of signing the deed. This evidence without doubt was sufficient to support the finding of the trial court that the plaintiff at the time of the execution of said deed was mentally incapable, due to the protracted and excessive drinking of alcoholic liquors, of understanding the nature of his act in the signing and execution of said deed. It is conceded by defendant that if this finding is supported by the evidence the judgment based thereon is valid. The law upon this question is well settled and is stated as follows: "The rule that the person alleging his incapacity should be bound by his contract because intoxication is his voluntary act was at first relaxed by allowing him to show that his condition was brought about by the other party. But a more rational view now prevails. The law now regards the fact of intoxication and not the cause of it, and regards that fact as affording proof of want of mental capacity. A completely intoxicated person is generally placed on the same footing as persons of unsound mind. One deprived of reason and understanding by reason of drunkenness is, for the time, as unable to consent to the terms of a contract as are persons who lack mental capacity by reason of insanity or idiocy. A person who at the time of making a contract is completely intoxicated may avoid his contract notwithstanding the fact that his intoxicated condition may have been caused by his voluntary act and not by the contrivance of the other party to the contract.
* * * " 6 Ruling Case Law, p. 595.

It is true that there is evidence in the record that plaintiff was sober and possessed of all his mental faculties during the entire day on which he executed said deed, but this evidence only creates a conflict with that supporting said finding. Defendant contends

that it is incredible that she could take the plaintiff forty-five miles from Loyalton to Reno, where they obtained the marriage license from the county clerk, and then back to Loyalton for the description of the property and afterwards return to Reno to the lawyer's office where the deed was prepared and then to the justice of the peace where the wedding ceremony was performed, without some of the parties concerned observing the condition of the plaintiff. It does not appear, however, that the county clerk or justice of the peace were called as witnesses at the trial. The two parties who accompanied the plaintiff and defendant on the trip to Reno were close friends of the defendant. It is true that the attorney who prepared the deed did not testify that he observed anything unusual in the appearance or actions of the plaintiff, but the notary who was also court reporter, and evidently a person of considerable standing, did observe the dazed condition of the plaintiff and his actions as one who was stupid or stunned. It may well be said that it seems incredible that a man of plaintiff's age and experience, while in his right mind, would convey practically all his property to the defendant, or to any other person, without any monetary consideration, and thus deprive himself of the means of making a living for himself and providing for the support of his three children, which support he was obligated to furnish at the order of the court granting his divorce. This is not an action where a man has induced some young and inexperienced woman to marry him by conveying to her property and, thereafter becoming tired of his bargain, seeks to recover the property on the ground of undue influence or misplaced confidence. The defendant was a woman of over fifty years of age at the time. She had been married twice before, and she admitted that she was marrying the plaintiff as a business proposition. At no time did she manifest any affection toward the plaintiff. She evidently reposed but little confidence in him, or was aware of his intoxicated condition, as she absolutely refused, at the suggestion of the attorney, to proceed with the marriage ceremony until the deed to plaintiff's valuable farm was signed and delivered to her. These matters were undoubtedly given careful consideration by the trial judge who, after a review of all the evidence with the parties before him and an opportunity to observe their conduct and demeanor, believed the testimony of the plaintiff and his witnesses, and made findings favorable to him. According

to the well-established rule in cases involving conflicting evidence, the findings of the trial court must be sustained on appeal.

[3] It is not necessary for us to give any extended consideration to the further contention of the defendant that there is no evidence to support the finding of the trial court that there was no consideration for the deed. It is, of course, true that marriage is a good consideration for a deed, or for a contract generally, but if the deed was executed by the grantor at a time when he was incapable of understanding his act in the execution thereof, his marriage was entered into while in the same state of mind. If one was not binding upon him by reason of the fact that he was mentally incompetent of entering into a valid contract, the other may be avoided for the same reason. In these circumstances it cannot be said that the marriage ceremony to which the plaintiff and defendant were parties formed a valid consideration for the execution of said deed.

The judgment is affirmed.



2 Cal.2d 513

WERNSE v. DORSEY et al.

Sac. 4859.

Supreme Court of California.

Feb. 26, 1935.

1. Partition ⚡73

Interlocutory decree of partition granted to plaintiff whose interest in property was encumbered held defective, where decree showed on its face that lien claimant was not made party to action and referee was not appointed to inquire into amount or bona fides of lien, and where decree allowed sale subject to lien on plaintiff's interest and provided that amount received at sale should be equally divided between parties (Code Civ. Proc. §§ 761, 762).

2. Partition ⚡73

Refusal of motion of defendant in partition to set aside default decree held abuse of discretion, where decree ordered sale subject to lien on plaintiff's interest, and provided that amount received at sale should be equally divided between parties, since decree of sale upon basis of clear title and equal division of proceeds was all that defendant could

logically have expected to result from his default (Code Civ. Proc. §§ 473, 761, 762).

3. Partition ⚡88

Decreeing sale in partition subject to lien is proper, where lien is upon united interest of all claimants to property, but not where only one undivided interest is subject to lien (Code Civ. Proc. §§ 761, 762).

4. Partition ⚡88

In partition, where only one undivided interest is subject to lien, sale should be free of lien and lien should be satisfied by deducting from lienee's share of proceeds amount of his indebtedness (Code Civ. Proc. §§ 761, 762).

In Bank.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by Harry W. Wernse against Theodore C. Dorsey and others, wherein an interlocutory decree of partition was rendered and became final. From an order refusing defendants' motion to vacate and set aside the decree, and from an order confirming a sale had thereunder, named defendant appeals.

Orders reversed, with directions.

Warren E. Sisson, of Oakland, for appellant.

Vernon Stoll, of Grass Valley (Sherman & Peters, of San Francisco, of counsel), for respondent.

PRESTON, Justice.

Plaintiff and respondent Harry W. Wernse and defendant and appellant Theodore C. Dorsey were owners of equal interests in certain mining ground in Nevada county known as the West Point Quartz Mining Claim. The interest of respondent was encumbered by deed of trust to secure an indebtedness of \$10,000 in favor of a predecessor in ownership of said interest. Respondent filed this action in partition alleging the necessity of sale of the property in lieu of a partition in kind, making no reference in his complaint to said deed of trust. Appellant answered admitting the title and interest as alleged, but denying the necessity of a partition sale. The case, upon notice, was duly set for trial June 14, 1933. Appellant, acting advisedly, neglected to attend said trial. Evidence was received and an interlocutory decree of partition followed, with a specification therein setting up the above-mentioned encumbrance upon the interest of respondent. A single referee was appointed to conduct the sale. Said decree

became final, whereupon the present counsel for appellant came into the case.

[1] The interlocutory decree, as entered on July 5, 1933, showed upon its face the following deficiencies, prejudicial to appellant: (1) The lien claimant was neither made a party to the action nor was a referee appointed to inquire into the amount or the bona fides of the lien as contemplated by sections 761 and 762 of the Code of Civil Procedure; (2) the sale was necessarily to be subject to said lien inasmuch as the court failed to order the property sold free of liens or to order satisfaction of said lien out of the share of the proceeds of sale belonging to respondent; (3) the decree not only allowed a sale subject to the lien on respondent's interest but actually provided that the amount received at the sale should be equally divided between the parties.

Appellant, on September 23, 1933, moved under section 473 of the Code of Civil Procedure to vacate the default judgment entered against him, basing his motion upon a showing of excusable neglect and, among other things, upon the matters appearing upon the face of the decree as above outlined. This motion was heard and denied on September 28, 1933. Thereafter the commissioner advertised said property for sale, subject to said lien of said deed of trust and thereafter, to wit, on September 29, 1933, the sale was conducted and the purchaser thereat bid for the property, subject to said lien, the sum of \$1,100. Respondent thereupon on October 9, 1933, gave notice that on October 20th he would move the court for an order confirming the sale. On the same day, October 9th, appellant also gave notice of motion, to wit: That on October 20th he would again move the court to vacate and set aside said judgment by default, which motion would be based on substantially the same grounds urged in his first application. He also interposed objections to confirmation of said sale upon practically the same grounds on which he attacked the interlocutory judgment.

A hearing was had upon both of these matters and evidence taken, the result of which was an order made October 24, 1933, denying appellant's motion to vacate the default decree and an order confirming the sale. Formal order of confirmation of the sale was made on November 3, 1933. Appellant is now before us with an appeal from both said orders of the court, to wit, the order denying his motion and the order confirming the sale.

[2] We think that appellant's motions to set aside should have been granted and failure to

grant one or the other of them constituted such an abuse of discretion as to warrant our interference. Under the pleadings as they existed when appellant made default, no such injurious consequences of a default were apparent or could have been foreseen by him. A decree of sale upon the basis of a clear title and an equal division of the proceeds was all that appellant could logically expect to result from his default. But he has found himself sharing the burden of a \$10,000 indebtedness with the respondent, an indebtedness for which he is in no sense liable. This should not be.

[3, 4] While it is allowable to decree a sale in partition subject to a lien, where the lien is upon the united interests of all claimants to the property, we cannot see how such a decree can properly be made where only one undivided interest is subject to the lien. The only just procedure would seem to be to sell the property free of liens and satisfy the lien against the interest of the joint owner by deducting from his share of the proceeds the amount of his indebtedness. This procedure was followed in this state on at least two occasions: *Deacon v. Deacon*, 101 Cal. App. 195, 281 P. 533; *Holt v. Holt*, 131 Cal. 610, 63 P. 912.

In 47 Corpus Juris, p. 617, § 946, this conclusion is justified by the following: "When proper notice has been given to encumbrancers in accord with the statutory requirements, a conveyance to the purchaser under a partition sale is a bar against all such persons having general liens or encumbrances by judgment or decree on any undivided share or interest in the property sold. The sale extinguishes encumbrances on the undivided portions, and transfers them to the proceeds allotted to the individuals on whose undivided interests the encumbrance formerly rested. * * *

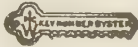
Freeman on Cotenancy and Partition (2d Edition) § 479, p. 638, discussing a kindred situation, says: "If no means were provided by which the existence of liens against a cotenant's moiety could be brought to the attention of the court, great injustice would be done. The lands would be sold at a sacrifice owing to the existence of such liens; while the cotenant against whose moiety the lien existed would claim his proportion of the proceeds of the sale, without allowing any deduction on account of the lien. The authority of courts to order a sale of the property of cotenants is based upon statutes all of a comparatively modern date. These statutes will, on examination, be found to contain provi-

sions by means of which either of the cotenants in the partition suit may have all the liens chargeable upon the property ascertained, and may have such a disposition made of the proceeds of the sale as will protect him from loss."

The proceedings to confirm the sale, being based upon the erroneous and injurious interlocutory decree, must of necessity be affected by the same infirmities.

Accordingly, both orders appealed from are reversed, with directions to the court below to vacate the interlocutory decree in partition, and all subsequent proceedings, and to take the steps required by sections 761 and 762 of the Code of Civil Procedure with respect to lien claimants and to otherwise proceed with the cause in a manner consistent with the holding here made.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



4 Cal.App.2d 202

EVANS v. McGRANAGHAN.
Civ. 9505.

District Court of Appeal, First District,
Division 2, California.
Jan. 28, 1935.

As Modified on Denial of Rehearing
Feb. 25, 1935.

1. Physicians and surgeons ☞6(3)

Licensed chiropractor has authority to practice chiropractic as taught in chiropractic schools, regardless of whether such practice would prior to enactment of Chiropractic Act have been construed as practice of medicine, surgery, osteopathy, dentistry, or optometry (Chiropractic Act St. 1923, p. xxii, § 7).

2. Physicians and surgeons ☞6(3)

Licensed chiropractor is authorized to practice chiropractic as taught in chiropractic schools, together with necessary mechanical, hygienic, and sanitary measures included in chiropractic or not included in practice of medicine, surgery, osteopathy, dentistry, or optometry (Chiropractic Act St. 1923, p. xxii, § 7).

3. Physicians and surgeons ☞13

Evidence of scope of chiropractic as taught in chiropractic schools held admissible on question whether agreement of chiropractor to give treatments involving mechanical and hygienic and sanitary measures was authorized (Chiropractic Act St. 1923, p. xxii, § 7).

4. Physicians and surgeons ☞13

Patient suing licensed chiropractor for declaration of his rights under contract for treatments involving mechanical, hygienic, and sanitary measures, was required to produce evidence of scope of chiropractic as taught in chiropractic schools, where defendant asserted that contract called for unauthorized practice (Chiropractic Act St. 1923, p. xxii, § 7).

5. Appeal and error ☞891

District Court of Appeal will not take testimony on appeal for purpose of reversing a judgment.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Mons Evans against M. James McGranaghan. Judgment for defendant, and plaintiff appeals.

Affirmed.

Samuel J. Jones, of San Francisco, for appellant.

M. Jas. McGranaghan, of San Francisco, in pro. per.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Frank V. Kington, of San Francisco, amici curiæ.

PER CURIAM.

The petition for rehearing is denied.

The opinion heretofore filed herein is modified to read as follows: Respondent is a licensed chiropractor under section 7 of the Chiropractic Act, Statutes of 1923, p. xxii. Respondent and appellant entered into a contract in writing whereby respondent agreed to treat appellant for a period of one year. The contract contained the following provision: "The said services shall include chiropractic adjustment, and all mechanical, hygienic and sanitary measures incident to the care of the body deemed necessary by the party of the second part (respondent), and such mechanical, hygienic and sanitary measures shall include diet, concussion, traction, enemas, diathermy, sinusoidal, galvanic, Sun-lite, cold quartz, massage, baths, hot and cold

packs, manipulation, massage, X-ray, Laboratory tests, and such other like measures, provided that such measures or modes of treatment are within the scope of the practice under the provisions of the Chiropractic Act of California. * * *

Appellant filed a complaint alleging that respondent refused to give him any treatments under the contract except chiropractic adjustments, on the ground that the mechanical, hygienic, and sanitary measures enumerated in the contract were not within the legal scope of his license under the Chiropractic Act, and prayed for a declaration of his rights under the contract pursuant to Code of Civil Procedure, § 1060. Respondent, answering, admitted the contract and his refusal to perform beyond giving appellant chiropractic adjustments, and justified his refusal on the ground of a conflict as to the scope of his license and the danger of criminal prosecution and civil liability for negligence if he practiced any measure outside the scope of his license. The trial court gave judgment for defendant, from which this appeal is taken.

The decision of the court recites that the case was submitted to the court without evidence being introduced.

Section 7 of the Chiropractic Act authorizes the issuance of a license which "shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica."

[1, 2] As we construe section 7 of the Chiropractic Act, it authorizes the license holder to practice chiropractic as taught in chiropractic schools or colleges, regardless of whether such practice would have been construed as the practice of medicine, surgery, osteopathy, dentistry or optometry prior to the enactment of the Chiropractic Act. It contains no definition of "chiropractic * * * as taught in chiropractic schools or colleges," and hence, in the absence of evidence on that subject, it is impossible of precise construction. The act further in our

judgment authorizes the license holder to use all necessary mechanical and hygienic and sanitary measures incident to the care of the body which are included in chiropractic as taught in chiropractic schools or colleges, if any there be (a subject upon which, in the absence of evidence as to what is included in chiropractic as so taught, we cannot reach any conclusion), together with any other such necessary mechanical, hygienic, and sanitary measures, the use of which would not constitute the practice of medicine, surgery, osteopathy, dentistry, or optometry, nor involve the use of any drug or medicine now or hereafter included in materia medica.

[3, 4] While it is undoubtedly the rule "that there can be no intent in a statute not expressed in its words, and there can be no intent upon the part of the framers of such a statute which does not find expression in their words" (Ex parte Goodrich, 160 Cal. 410, 416, 417, 117 P. 451, 454, Ann. Cas. 1913A, 56), that rule is in no way violated by our holding in this case that in order to determine the scope of the words "chiropractic as taught in chiropractic schools or colleges" resort must be had to extrinsic evidence. The intent of the statute is clear upon its face: That the license shall authorize the holder to practice chiropractic as taught in chiropractic schools or colleges. But the court has no way of determining the scope of chiropractic as taught in such schools and colleges in the absence of evidence on that subject, and hence a resort to such evidence would be proper. *People v. Borda*, 105 Cal. 636, 639, 640, 38 P. 1110; 59 O. J. p. 1037. This ruling comports with the holding of the appellate department of the superior court of Los Angeles county in *People v. Schuster*, 122 Cal. App. (Supp.) 790, 794, 795, 10 P.(2d) 204.

Plaintiff was seeking a construction of the contract which depended upon the determination of the scope of practice allowed to defendant under his license, and since the determination of such scope of practice depended upon evidence it was incumbent upon plaintiff to produce it.

[5] The petition to take testimony in this court is denied. We will not take testimony for the purpose of reversing a judgment. *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970.

The judgment is affirmed.

5 Cal.App.2d 21

**BERN OIL CO., Limited, et al. v. SUPERIOR
COURT OF KERN COUNTY et al.
Civ. 1553.**

District Court of Appeal, Fourth District,
California.

Feb. 27, 1935.

Hearing Denied by Supreme Court
April 26, 1935.

Courts ⇐212

Where appeal from order granting injunction was pending before Supreme Court which had exclusive appellate jurisdiction of action, District Court of Appeal refused to review on certiorari validity of contempt judgment entered for violation of injunction where review would involve consideration of circumstances surrounding grant of injunction (Const. art. 6, § 4).

Certiorari proceeding by the Bern Oil Company, Limited, and others against the Superior Court of Kern County and another.

Writ discharged.

Hy Schwartz, of Los Angeles, and J. R. Dorsey, of Bakersfield, for petitioners.

Borton & Petrini, of Bakersfield, for respondents.

JENNINGS, Justice.

This is a proceeding in certiorari whereby petitioners seek to annul a judgment of the respondent court adjudging them guilty of contempt in having disobeyed a prior order of said court. The prior order which it was adjudged petitioners had violated was one that was issued in an action wherein these petitioners were defendants. The order thus made granted injunctive relief pending a trial of the cause on its merits in accordance with the prayer of the complaint in said action. These petitioners appealed from the order and the appeal thus taken is now pending. Subsequent to the taking of the appeal, contempt proceedings were instituted which resulted in the rendition of the judgment which is here sought to be annulled.

It is obvious that the action in which the order which petitioners were adjudged to have disobeyed was made, was equitable in character. An appeal therefrom lay within the exclusive appellate jurisdiction of the Supreme Court. Const. of California, art. 6, § 4. The attack which is here presented upon the judgment of contempt is based on the familiar contention that the respondent court exceeded its jurisdiction in entering the judgment. Proper consideration of this conten-

tion will require careful analysis of the nature and character of the injunction granted by the order from which an appeal has been taken. In this study it is our opinion that the circumstances which surrounded the granting of the injunction are necessarily involved. Since the appeal which has been taken from the order of injunction lies within the exclusive appellate jurisdiction of the Supreme Court and, as a matter of fact, the appeal is now pending before that court, it is our conclusion that although this court has jurisdiction to review the proceedings which resulted in the entry of the judgment of contempt, it should not, under the above-mentioned circumstances, do so. *Collins v. Superior Court*, 147 Cal. 264, 81 P. 509; *Favorite v. Superior Court*, 181 Cal. 261, 184 P. 15, 8 A. L. R. 290; *In re Estate of Turner*, 39 Cal. App. 56, 177 P. 854; *Gunder v. Superior Court*, 100 Cal. App. 334, 279 P. 822.

The writ heretofore granted is therefore discharged.

We concur: BARNARD, P. J.; MARKS, J.



4 Cal.App.2d 602

In re ERICKSON'S ESTATE.

JANSSON et al. v. MONTEN.

Civ. 9322.

District Court of Appeal, Second District,
Division 1, California.

Feb. 16, 1935.

Wills ⇐410

Where appellate court reversed judgment which set aside and revoked probate of will, but made no order concerning costs, clerk of appellate court could not, pursuant to general court rule, insert in remittitur direction of costs for appellant, since general rule does not apply to costs in probate proceedings, which are regulated by statute (Probate Code, §§ 383, 1232; Court rule 23).

On motion to recall remittitur and issue corrected remittitur after reversal of a judgment which revoked the probate of a will.

Motion granted, and remittitur corrected.

Prior opinion, 35 P.(2d) 628.

Charles C. Montgomery, of Los Angeles, for appellant.

Oscar W. Houge and Roscoe R. Hess, both of Los Angeles, for respondents.

CONREY, Presiding Justice.

This was a contest after probate of the will of decedent. On appeal from a judgment setting aside and revoking the probate of the will, the judgment was reversed by this court, which in its decision made no order concerning costs. Following the general rule concerning costs on appeal (rule 23 of the rules of this court), the clerk inserted in the remittitur a direction that appellant recover costs on appeal. Respondents now move for an order recalling the remittitur, and for issuance of a corrected remittitur omitting the words "appellant to recover costs on appeal."

It has been held that by reason of the fact that the subject of costs in probate proceedings is specially provided for, the general rules concerning costs as set forth in section 1021 et seq., of the Code of Civil Procedure, do not apply to probate proceedings. In *re Estate of Olmstead*, 120 Cal. 447, 452, 52 P. 804. For like reasons, the general rule 23 should not apply in this case. The decision in *Re Estate of Johnson*, 200 Cal. 307, 252 P. 1052, 1053, deals with the same subject, except that there the contest was before probate, whereas the present contest was after probate. The court in dealing with the motion to recall the remittitur held that, as the court in its decision had not exercised its discretion in awarding costs, the provision awarding costs on said appeal was improperly incorporated in the remittitur.

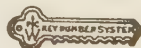
The Probate Code, § 1232, in the article on rules of procedure says: "When not otherwise prescribed by this code, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." And section 383, in the article on contests after probate, says: "If the probate is not revoked, the costs of trial must be paid by the contestant. If the probate is revoked, the costs must be paid by the party who resisted the revocation or out of the property of the decedent, as the court directs." We are of the opinion that the remittitur issued in this case should not have contained the direction as to costs. In its decision in *Re Estate of Johnson*, supra, the Supreme Court said: "As this court has lost jurisdiction of the former appeal, we may not now exercise any dis-

cretionary power in awarding costs therein. An appropriate order may, however, be made by the trial court with reference to the costs on the former appeal in the exercise of its discretion under said section 1720." The reference was to section 1720 of the Code of Civil Procedure, which was in substance the same as the present section 1232 of the Probate Code.

The motion is therefore granted, and it is ordered that the remittitur issued herein by the clerk of this court on October 30, 1934, be recalled, and that a corrected remittitur be issued in its place *nunc pro tunc*, omitting the words "appellant to recover costs on appeal."

I concur: YORK, J.

HOUSER, J., deeming himself disqualified, takes no part in this decision.



4 Cal.App.2d 616

FRANK et al. v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.
Civ. 10152.

District Court of Appeal, Second District,
Division 2, California.

Feb. 18, 1935.

Hearing Denied by Supreme Court
April 15, 1935.

1. Mandamus ☞43
Prohibition ☞5(3)

Where statute, when action was filed, required dismissal if action was not brought to trial within five years from date of answer, and statutory amendment subsequently enacted required dismissal unless case was brought to trial within five years from filing of action, and it appeared that defendants never filed answer, denial of defendants' motion, made more than five years from filing of complaint, that case be dismissed held within court's discretion, and defendants were not entitled to mandate or prohibition (Code Civ. Proc. § 583, as amended by St. 1933, p. 853).

2. Mandamus ☞28

Mandate does not lie to try correctness of discretionary rulings of competent court made within its jurisdiction.

3. Mandamus ☞141

Prohibition ☞16

Where subject-matter of action sounds in equity and appellate jurisdiction is there-

fore in Supreme Court, a District Court of Appeal will not take original jurisdiction of a writ, such as mandate or prohibition, growing out of such case (Code Civ. Proc. § 583, as amended by St. 1933, p. 853).

Mandate and prohibition proceeding by Alvin H. Frank and another against the Superior Court of the State of California in and for the County of Los Angeles, and Charles L. Bogue, Judge thereof. On demurrer to the petition.

Demurrer sustained, alternative writ discharged, and proceeding quashed.

Loeb, Walker & Loeb, of Los Angeles, for petitioners.

Goldman & Lieberman and Clarke & Bowker, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

Our alternative writ of mandate and our writ of prohibition have heretofore issued, and this matter is now before us upon a demurrer to the petition upon which the writs were issued and upon a motion to quash both. If it is claimed that no cause upon which to base either is alleged in the petition.

[1] The facts upon which the question is based are simple and uncontroverted. An action was brought in the superior court and was not brought to trial within five years. Within five years from the filing of such case in the superior court, section 583 of the Code of Civil Procedure was amended (St. 1933, p. 853). At the time the case was filed the statute required that any case not brought to trial within five years from the date of the answer must be dismissed unless the statute was waived by written stipulation. The change was that the five years should run from the filing of the complaint. It appears that petitioners herein never filed an answer. A stipulation delaying action was had between the parties but it did not waive the statute. More than five years from the date of filing of the complaint plaintiff gave notice that no amended complaint would be filed and that he would stand on the third count of the second amended complaint. Defendants (petitioners herein) moved that the case be dismissed. The court denied the motion and will proceed with it unless we interfere.

That the change made in section 583 of the Code of Civil Procedure is retrospective was decided by *Coleman v. Superior Court*, 135 Cal. App. 74, 26 P.(2d) 673. That case also de-

cided that although the time for dismissal could be shortened by the amendment, the time for bringing the case to trial after the effective date of the amendment must be reasonable, all of the circumstances considered.

[2, 3] In the instant case the court considered the circumstances and under the exercise of its sound discretion denied the motion. Mandate cannot try the correctness of any discretionary ruling of a competent court made within its jurisdiction. *Kerr v. Superior Court*, 130 Cal. 183, 62 P. 479. Where the subject-matter of the action sounds in equity, and the case out of which this proceeding arises does, a District Court of Appeal will not take original jurisdiction of a writ growing out of it. *Collins v. Superior Court*, 147 Cal. 264, 81 P. 509; *Gunder v. Superior Court*, 100 Cal. App. 334, 279 P. 822; *Los Feliz Investment Co. v. Superior Court* (Cal. App.) 35 P.(2d) 131.

The demurrer to the petition for each of said writs is sustained. The alternative writ of mandate and the writ of prohibition are discharged, and the whole proceeding quashed.

We concur: CRAIL, J.; WILLIS, Justice pro tem.



4 Cal.App.2d 619

**SHEWITT v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**
Civ. 10164.

District Court of Appeal, Second District,
Division 2, California.

Feb. 18, 1935.

1. Dismissal and nonsuit ⇐60(1)

Where statute originally provided that court might, if action was not brought to trial within two years after answer, dismiss the action, and should do so if action was not brought to trial within five years after answer, and under statutory amendment changed running of statute from filing of answer to filing of complaint, court, under the two-year provision, had discretion to dismiss the complaint where action was not brought to trial within two or even within five years from its filing or from filing of answer (Code Civ. Proc. § 583, as amended by St. 1933, p. 853).

2. Mandamus ⇨28

Mandate does not lie to try correctness of discretionary ruling of competent court made within its jurisdiction.

3. Courts ⇨207(4)

Where subject-matter of action sounds in equity so that appellate jurisdiction is in Supreme Court, a District Court of Appeal will not take original jurisdiction of a writ, such as mandate, growing out of the case.

Proceeding for a writ of prohibition, later amended so as to ask for a writ of mandate, by Murray Shewitt against the Superior Court of the State of California in and for the County of Los Angeles and Charles L. Bogue, Judge thereof.

Proceeding quashed.

Goldman & Lieberman, of Los Angeles, for petitioner.

STEPHENS, Presiding Justice.

This proceeding arises from the same general statement of facts, with nonessential differences, and raises the same legal questions as Frank v. Superior Court, 4 Cal.App.2d 616, 41 P.(2d) 940, this day decided by us.

Herein petitioner originally prayed for a writ of prohibition against the superior court prohibiting it from dismissing the action against one of the defendants, Charles S. Jones, but later amended his petition so as to ask for a writ of mandate to compel the court to reinstate the case as, in the meantime, the court had dismissed it. No writ of any kind has issued out of this proceeding.

[1] The action had not been brought to trial within two nor in fact within five years from its filing, nor from the filing of Jones' answer, and no written stipulation had been entered into waiving the statute. Section 583, Code Civ. Proc. The statute had been amended (St. 1933, p. 853) between the time of filing the original action and the motion to dismiss, changing the running of the statute from the filing of the answer to the filing of the complaint. The statute provides that the court may dismiss under the two-year provision and *shall* dismiss under the five-year provision. It seems clear that the court had undisputed jurisdiction to use its discretion and rule on the motion under the two-year provision.

[2,3] In the instant case the court considered the circumstances and under the exercise of its sound discretion granted the mo-

tion. Mandate cannot try the correctness of any discretionary ruling of a competent court made within its jurisdiction. *Kerr v. Superior Court*, 130 Cal. 183, 62 P. 479. Where the subject-matter of the action sounds in equity, and the case out of which this proceeding arises does, a District Court of Appeal will not take original jurisdiction of a writ growing out of it. *Collins v. Superior Court*, 147 Cal. 264, 81 P. 509; *Gunder v. Superior Court*, 100 Cal. App. 334, 279 P. 822; *Los Feliz Investment Co. v. Superior Court* (Cal. App.) 35 P.(2d) 131.

The proceedings are quashed. *Fink v. Superior Court*, 105 Cal. App. 540, 288 P. 124.

I concur: CRAIL, J.



4 Cal.App.2d 700

TRACEY et al. v. L. A. PAVING CO. et al.
Civ. 9333.

District Court of Appeal, Second District,
Division 2, California.

Feb. 21, 1935.

Hearing Denied by Supreme Court
April 22, 1935.

1. Trial ⇨139(1)

Trial court, considering motion for directed verdict, cannot weigh evidence but has power to grant motion where there is no substantial evidence tending to prove all the controverted facts necessary to establish plaintiff's case (Code Civ. Proc. § 629).

2. Trial ⇨168

Trial court can direct verdict where it has right to grant nonsuit (Code Civ. Proc. § 629).

3. Appeal and error ⇨934(1)

Appellate court reviewing judgment notwithstanding verdict entered for defendant must read testimony in light most advantageous to plaintiff, resolve all conflicts in his favor, and give him benefit of every fact pertinent to issues involved which reasonably may be deduced from the evidence (Code Civ. Proc. § 629).

4. Appeal and error ⇨934(1)

Jury verdict is conclusive on appellate court on appeal from entry of judgment notwithstanding verdict for defendant where material facts are in dispute, or the consideration of oral testimony and the credibility of witnesses is involved and every essential ele-

ment of plaintiff's case is supported by substantial evidence (Code Civ. Proc. § 629).

5. Automobiles ⇨245(16, 82)

In action for injuries from collision between truck and bicycle where there was evidence from which jury could infer that truck driver was negligent and bicyclist was not negligent, truck driver's motion for directed verdict *held* properly denied.

6. Judgment ⇨199(1)

Motion for judgment notwithstanding verdict made before entry of judgment was properly denied where granting motion for directed verdict would have been erroneous (Code Civ. Proc. § 629).

7. Judgment ⇨199(3)

Trial court's power to grant motion for judgment notwithstanding verdict after entry of judgment is limited to same rules applicable to motions for nonsuits and directed verdicts, and court cannot weigh and resolve conflicts in evidence notwithstanding code gives court power, on hearing motion for new trial after denial of motion for directed verdict and judgment notwithstanding verdict, to order judgment notwithstanding verdict when it appears from whole evidence that a verdict should have been directed at the trial (Code Civ. Proc. § 629).

8. Judgment ⇨199(3)

In action for injuries, entry of judgment notwithstanding verdict on motion for new trial made after entry of judgment *held* error where motion for directed verdict was properly denied under evidence, since court after entry of judgment could enter judgment notwithstanding verdict on motion for new trial only where denial of motion for directed verdict was erroneous (Code Civ. Proc. § 629).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Actions by Matthew Francis Tracey, Jr., a minor, by his guardian ad litem, Matthew Francis Tracey, and Matthew Francis Tracey against the L. A. Paving Company and another. From judgments notwithstanding the verdicts, plaintiffs appeal.

Reversed and remanded, with directions.

George P. Kinkle, John S. Hunt, and Gretchen Wellman, all of Los Angeles, for appellants.

Harry D. Parker and Horace W. Danforth, both of Los Angeles, for respondents.

WILLIS, Justice pro tem.

Plaintiffs are a minor and his father. The minor sued defendants for damages for per-

sonal injuries, and in the same complaint the father joined, seeking recovery for expenses incurred by him in treatment and care of the injured son. The cause was tried before the court with a jury, and at the close of evidence defendants moved for directed verdicts against each plaintiff. These motions were denied and thereafter verdicts were returned by the jury in favor of each plaintiff for certain amounts, whereupon defendants made motions for judgments in favor of defendants notwithstanding such verdicts, in the alternative form, reserving the right to apply for a new trial if such motions be denied. These motions were also denied and judgments on the verdicts were thereafter entered. In due course defendants moved for a new trial, and on the hearing of this motion the trial court ordered judgments to be entered in favor of defendants notwithstanding the verdicts. From these judgments, the plaintiffs have appealed.

The motions for directed verdicts and for judgment notwithstanding the verdicts were made on the ground that the evidence failed to show any negligence on the part of defendants and that the evidence affirmatively showed negligence on the part of the injured minor which proximately contributed to the accident.

Section 629 of the Code of Civil Procedure creates two occasions on which a judgment may be ordered by the trial court notwithstanding the verdict. The first is when a motion for directed verdict has been made and denied, and, before judgment has been entered on a verdict, the court, either on its own motion or on motion of the aggrieved party, upon determining that the motion for directed verdict should have been granted, may render a judgment notwithstanding the verdict. The second occasion is when the motion for judgment notwithstanding the verdict has been made after denial of a motion for a directed verdict with the alternative reservation of the right to move for a new trial, and motion for a new trial has been duly made after entry of the judgment on the verdict, the trial court, on the hearing of the motion for new trial, "may order judgment to be so entered when it appears from the whole evidence that a verdict should have been so directed at the trial."

Appellants contend that the court properly acted in denying the motions for directed verdicts and for judgments notwithstanding the verdicts before entry of the judgments thereon, but erred in ordering the entry of judg-

ments notwithstanding the verdicts, after entry of such judgments and on the hearing of the motion for new trial, on the ground that under the rules governing determination of motions for directed verdict and judgments notwithstanding the verdict the court had no more or different power in the last instance than in the first. Respondents, on the other hand, contend in substance and effect, in support of the action of the trial court in the last instance, that by the use of the expression "from the whole evidence" in the clause above quoted from section 629 of the Code of Civil Procedure the Legislature declared that the trial court, under such special circumstances, was freed from the rules ordinarily governing motions for directed verdicts and was given power to consider the evidence as a whole and determine what evidence was intrinsically credible, and what was inherently improbable and not entitled to belief, and thus give true value and significance to the evidence in the case. These opposing contentions require a construction of section 629 and its relation to the law governing decision of motions for directed verdicts. For in the final analysis of this question it is manifest that no judgment may ever be rendered or ordered by the trial court notwithstanding the verdict, either before or after entry of judgment on the verdict, unless it appears that the motion for directed verdict should have been granted in the first instance.

[1, 2] The power of the trial court to pass upon the motion for a directed verdict is strictly limited. In considering such motion it cannot weigh evidence. Its right to direct a verdict is the same as the right to grant a nonsuit. *Perera v. Panama-Pacific, etc., Co.*, 179 Cal. 63, 175 P. 454; *Hunt v. United Bank & Trust Co.*, 210 Cal. 108, 291 P. 184. The rules governing the court in passing on motions for nonsuit and for directed verdicts have been so frequently stated in decisions of our appellate courts that it would be like carrying coal to Newcastle to repeat them herein. A comprehensive statement thereof appears in the case last above cited. Suffice it to say here that the power to grant the motion for directed verdict exists when there is no substantial evidence tending to prove all the controverted facts necessary to establish plaintiff's case. *Newson v. Hawley*, 205 Cal. 188, 270 P. 364.

[3, 4] On an appeal from a judgment notwithstanding the verdict, under the provisions of section 629 of the Code of Civil Procedure, it is the duty of the appellate court to read the testimony in a light most advan-

tageous to the plaintiff and, resolving all conflicts in his favor, give to him the benefit of any and every fact pertinent to the issues involved which may reasonably be deduced from the evidence. If the material facts are in dispute, or the consideration of oral testimony and the credibility of witnesses are involved, and after a careful study of the evidence it appears that there is substantial evidence to support every essential element of plaintiff's case, the verdict of the jury must be held conclusive, and judgment notwithstanding the verdict will be erroneous. *Landers v. Crescent Creamery Co.*, 118 Cal. App. 707, 5 P.(2d) 934.

[5, 6] In the light of the foregoing rules, we have examined the evidence adduced at the trial herein. To state herein all the evidence pertinent to the present inquiry would unduly lengthen this opinion and would serve no useful purpose. We are therefore content to state that upon such examination of the testimony we find substantial evidence which tends to support all the essential facts necessary to support a verdict in favor of plaintiffs. There is a real and substantial conflict in the testimony relating to the defendant driver's knowledge of the presence of the boy and bicycle beside his truck at the moment when the driver suddenly swerved his truck towards the bicycle, thereby causing a collision. There is evidence from which the jury could reasonably infer that the driver saw the boy and bicycle, and without ordinary care and without warning turned his truck so as to collide with the bicycle; and this notwithstanding the driver's testimony that he did not see the boy or bicycle and did not know he was there. There was also evidence of circumstances from which the jury might infer that the boy was not guilty of any negligence contributing to the accident. Without attempting to state such evidence, it is sufficient to say that there appears herein substantial support of all the essentials necessary to establish plaintiffs' case, and full justification of the order denying the motion for directed verdicts. And it follows as a matter of course under the law that the motion for judgment notwithstanding the verdicts, made before entry of judgments on the verdicts, was properly denied.

[7] It being thus determined that the motion for directed verdict should not have been granted and was properly denied under the rules controlling the trial court's action, did the language of section 629 above quoted change the status of the trial court's power

and enlarge the same to the extent that, on hearing the motion for new trial, it could review the whole evidence, weigh the same, pass on credibility of witnesses, and then substitute its decision of facts for that implied by and supporting the verdicts of the jury? To this query our answer is unequivocally in the negative. We hold that on consideration by the trial court of the "whole evidence" on a motion for new trial, or by the appellate court on an appeal from the judgment on a verdict, the power of the respective court to order a judgment notwithstanding the verdict is limited by the same restrictions and bound by the same mandates applicable to nonsuits and motions for directed verdicts in the first instance. The section expressly limits the power to order such judgments only when it appears that a verdict should have been directed at the trial. If under the rules a verdict should not have been directed at the trial, no power to thereafter order a judgment notwithstanding the verdict exists. It is clear that the Legislature, in granting power to the trial court on the hearing of a motion for new trial which has been made under reservation on the previous motion for judgment notwithstanding the verdict, to order such a judgment when it appears that a motion for a directed verdict duly made should have been granted, intended to confer upon the trial court the power to correct a judicial error in denying the motion for directed verdict and order the correct judgment notwithstanding the verdict, instead of granting a new trial, thus promptly correcting error at its source and expediting the administration of justice. The Legislature recognized the contingency that upon the hearing of a motion for a new trial based on the ground of insufficiency of the evidence to sustain the verdict it might become manifest to the court, on its review of the whole evidence at such hearing, that it had erred in denying the motion for directed verdict. Under the new section the court was empowered to correct that error in the court where it arose. But the power conferred went no further. It did not authorize the court to weigh the evidence and resolve conflicts, and, as a consequence, substitute its conclusions on the facts for that of the jury and order judgment thereon notwithstanding the verdict of the jury. For that, if permitted, would have the effect of depriving the aggrieved litigant of his constitutional right to a trial by jury. Upon such a hearing, unless the court is satisfied that error was committed in denying the mo-

tion for directed verdict, its power is limited to granting the motion for a new trial under the statute and rules controlling in such case.

[8] Under the rules governing directed verdicts and the conclusions we have drawn from the record of the evidence as above stated, we are of the opinion that the trial court did not have the right to decide from the whole evidence that verdicts for the defendants should have been directed in the first instance and therefore did not have the right to order judgments notwithstanding the verdicts on the hearing of the motion for a new trial. *Tomlinson v. Kiramidjian*, 133 Cal. App. 418, 24 P.(2d) 559.

The judgments are reversed and the cause remanded with directions to enter judgments on the verdicts as rendered.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 23

CLARK v. DE SAISSET.

Civ. 9671.

District Court of Appeal, First District,
Division 2, California.

Feb. 28, 1935.

Hearing Denied by Supreme Court
April 29, 1935.

Executors and administrators 202(1)

Deceased's agreement to pay plaintiff one-half of all money or property recovered for him by plaintiff, where plaintiff recovered one-third life estate interest in property and accumulated net income thereon, required deceased's administratrix to pay plaintiff one-half of the sum retained by trustees of the life estate out of the accumulated income as a reserve fund, which fund was transferred to deceased's estate at his death, together with interest thereon from time plaintiff recovered judgment for deceased, since money was due and owing to plaintiff at time of judgment.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Roy E. Clark against Lorraine De Saisset, as administratrix with the will annexed of the estate of Pierre De Saisset.

From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Owen D. Richardson, of San Jose, for appellant.

J. L. Smith, of San Francisco, for respondent.

NOURSE, Presiding Justice.

In an action tried before the court, sitting without a jury, the plaintiff had judgment against the estate upon a written contract with the deceased under which the latter agreed to pay plaintiff "50% of whatever money or property shall be recovered by or for said Pierre De Saisset." In an action prosecuted in Santa Clara county for his principal, the plaintiff, through counsel employed by him, recovered a judgment decreeing that Pierre was entitled to a one-third life estate interest in certain real property with an accumulated net income therefrom of over \$429,000. After deducting offsets paid to Pierre, it was found that he was entitled to the unpaid balance of \$16,000. It was further found in the Santa Clara action that \$20,000 was a reasonable sum to be retained as a "reserve fund" for the purpose of "extraordinary repairs or rebuilding in case of destruction of the buildings * * * by earthquake, fire, or other causes." Pierre was thereupon charged with one-third of that sum, or \$6,666.66, and the balance was paid to him by the defendants in that action. He then paid to plaintiff 50 per cent. of the sum so paid and requested him to forebear action for his portion of the sum left in the reserve fund. Plaintiff acceded to this request. Pierre died, terminating the life estate, and the trustees of the reserve fund paid to his administratrix the portion of that fund accredited to him. Plaintiff thereupon duly presented his claim to the administratrix, and, upon the rejection of the claim, commenced this action. The judgment appealed from is for the full sum claimed plus interest from the date of the recovery in the Santa Clara judgment. The appeal herein attacks the judgment as to both principal and interest.

In so far as the attack is directed to the principal of the judgment, the appeal is frivolous. The respondent and the deceased had a binding contract whereby the latter agreed to pay to the respondent 50 per cent. of whatever "money or property" the respondent should recover for him. The respondent recovered a judgment decreeing that the deceased was entitled to a one-third life estate

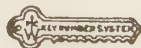
in certain property and through this decree deceased was paid one-third of the income from this property until the time of his death. The retention of a portion of the accrued income for emergency purposes was a matter with which this respondent had no concern. When that judgment was entered, respondent was entitled to immediate payment of 50 per cent. of all the money or property recovered by the deceased. Having made demand for payment upon the deceased, respondent was forestalled by the promise that he would be paid 50 per cent. of the sum held in reserve as soon as rents and profits were available.

We conclude, the contract called for payment in money or property recovered; both money and property were recovered in the Santa Clara judgment; the reserve fund was held in trust for certain purposes, but the trust terminated with the death of the deceased and the extinction of his life estate when the trustees paid the fund over to the administratrix; respondent's "recovery" dates from the Santa Clara judgment when the money was then demandable. As the sum due was fixed and certain at that time, interest on the judgment herein should run from the date of the Santa Clara judgment.

No other point requires consideration.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



4 Cal.App.2d 206

PEOPLE ex rel. CHIROPRACTIC LEAGUE
OF CALIFORNIA v. STEELE et al.
(SIPES et al., Interveners).
Civ. 9545.

District Court of Appeal, First District,
Division 2, California.
Feb. 25, 1935.

1. Injunction ⇨1

Codal provision prohibiting issuance of injunction to enforce penal law except in case of nuisance held declaratory of general rule existing when provision was adopted (Civ. Code, § 3369).

2. Injunction ⇨102

To justify issuance of injunction prohibiting criminal acts, it must appear that the acts, condition of property, or course of con-

duct complained of falls within definition of nuisance (Civ. Code, § 3369).

3. Constitutional law ⇨70(3)

Whether remedy by injunction is necessary to enforcement of acts governing practice of healing arts rests with Legislature, and not with the courts (Civ. Code, § 3369).

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

On petition for rehearing.

Rehearing denied.

Prior opinion, 40 P.(2d) 959.

J. H. McKnight, of Oakland, and Edward A. Stuart, of Los Angeles, for appellants.

Thomas Morris, of Los Angeles, amicus curiæ.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Frank V. Kington, of San Francisco, for respondent.

PER CURIAM.

[1] In the petition for rehearing filed herein respondent urges that section 3369 of the Civil Code cannot be construed so as to limit the inherent power of the superior courts to grant injunctions. The section however, in so far as it prohibits the issuance of an injunction to enforce a penal law except in a case of nuisance, is merely the codification of a general rule already existing at the time the section was adopted. The section was originally taken from Field's draft of the New York Civil Code, § 1883. In the Report of the Commissioners found at p. VII of Field's draft, it is said: "All the Commissioners profess is that they have endeavored to collect those general rules known to our law which are applicable to our present circumstances and ought to be continued." In the Code Commissioners' note appended to the section as originally drafted is cited in support of the provision here in question *Mayor of City of Hudson v. Thorne*, 7 Paige (N. Y.) 261, in which the chancellor said: "It is no part of the business of this court to enforce the penal laws of the state, or the by-laws of a corporation, by injunction, unless the act sought to be restrained is a nuisance." That this is the law now as it was then in a majority of the jurisdictions of this country including California we believe the citations in our opinion originally filed herein established. That apparently was the view of section 3369 of the Civil Code taken by our Supreme Court in *Perrin v. Mountain*

View Mausoleum Ass'n, 206 Cal. 669, 275 P. 787. In that case the court said at page 671 of 206 Cal., 275 P. 787, after quoting the section: "This statutory enactment is but the expression of the fundamental rule that courts of equity are not concerned with criminal matters and they cannot be resorted to for the prevention of criminal acts, except where property rights are involved."

[2] Respondent further contends that injunction may be resorted to in cases closely analogous to nuisance and in cases violative of public policy. This contention and the further contention of respondent that the continued violation of a statute constitutes in itself a public nuisance is fully discussed in *People v. Seccombe*, 103 Cal. App. 306, at pages 312-314, 284 P. 725, 728. The court there announced the conclusion that in order to justify the issuance of an injunction prohibiting criminal acts "It must appear that the acts, condition of property, or course of conduct complained of fall within the definition of a nuisance as laid down by our laws. * * * We feel that we can add nothing to the analysis of the cases in support of that conclusion contained in the opinion on that case.

People v. Barbieri, 33 Cal. App. 770, 166 P. 812, and *State v. Fanning*, 96 Neb. 123, 147 N. W. 215, are distinguishable from this case on the ground that in them the courts were passing upon statutes which specifically declared places conducted in violation of those statutes to be public nuisances, and provided for their abatement. Such cases as *Dworken v. Apartment House Owners' Ass'n*, 38 Ohio App. 265, 176 N. E. 577; *Unger v. Landlords' Management Corp.*, 114 N. J. Eq. 68, 168 A. 229; and *Sloan v. Mitchell*, 113 W. Va. 506, 168 S. E. 800, proceeded on a theory foreign to this action. In those cases, holders of licenses to practice a profession were allowed to enjoin unlicensed defendants from practicing the same profession in competition with them. The cases are not in point on the question of the right of the state to enjoin such unlicensed practice.

[3] Respondent urges the claimed disastrous consequences of our decision. It is sufficient to point out that if the Legislature had deemed the remedy by injunction necessary to the enforcement of the acts governing the practice of healing arts it would have been an easy matter to provide therefor by statute.

The petition for rehearing is denied.

4 Cal.App.2d 707

SHAFFER et al. v. SECURITY TRUST & SAVINGS BANK.

Civ. 1133.

District Court of Appeal, Fourth District,
California.

Feb. 21, 1935.

1. Vendor and purchaser ⇨30

When mental weakness, even though not amounting to absolute disqualification, is associated with inadequacy of consideration, undue influence, or a mistaken impression as to nature and effect of instrument, conjunction of any one of such elements is sufficient ground for cancellation.

2. Vendor and purchaser ⇨44

Evidence that 73 year old widow was suffering from weakness of mind arising largely from age and was grossly imposed on in being induced to purchase for \$7,000 small vacant lot which was never worth more than \$2,500, and in transaction to assume indebtedness that she could never pay, held sufficient evidence of mental disability, undue influence, and lack of adequate consideration to support judgment rescinding sale contract.

3. Vendor and purchaser ⇨117, 120

Generally, notice of rescission and offer to restore must be given, or restoration of property must be made, before action for rescission of contract for sale of land can be maintained (Civ. Code, § 1691).

4. Executors and administrators ⇨431(1)

Executor and heirs suing to rescind testatrix' contract for purchase of lot were not required to give notice of rescission or offer to restore testatrix' equitable interest in and right to purchase lot (Civ. Code, § 1691).

5. Executors and administrators ⇨438(10)

Purchaser's executor and heirs suing to rescind contract for sale of lot were not required to join real estate agents or to restore to them anything purchaser had received from them under her separate agreement with them for loan with which to purchase lot, where sale contract was complete and made no reference to loan agreement or to agents.

6. Vendor and purchaser ⇨123

In action to rescind contract for sale of lot, money judgment against vendor was not improper on theory purchaser did not pay vendor any money, where purchaser created fund by borrowing from real estate agents out of which payment was made.

7. Executors and administrators ⇨135

Purchaser's executor and heirs did not rescind contract for sale of lot after purchas-

er's death because they had notice of purchaser's mental infirmities, where they had no knowledge that at time of purchase lot had reasonable market value of only \$2,500 instead of \$7,000 which was paid therefor.

8. Executors and administrators ⇨437(1)

Purchaser's executor and heirs were not guilty of laches precluding rescission of contract for sale of lot, where executor, as soon as he learned all the circumstances of sale and value of property, communicated such facts to heirs, who lived in Europe, and asked for instructions, and, shortly after instructions were received, gave notice of rescission and instituted action.

9. Vendor and purchaser ⇨123

In action against vendor to rescind sale of lot, judgment against trustee selling lot could be rendered in trustee's individual capacity as well as in capacity of trustee, where trustee executed sale contract in its individual capacity and not as trustee, declaration of trust was unrecorded, and purchaser had no notice or knowledge thereof.

10. Vendor and purchaser ⇨123

In action to rescind contract for sale of land, judgment against vendor should not be reduced by amount of discount at which real estate agents sold purchaser's note and mortgage, where loss was agents' and not vendor's.

11. Vendor and purchaser ⇨107

Rescission of contract for sale of lot could be had against vendor, though lot had depreciated in value between 40 and 50 per cent. during depression, since rescission goes back to date contract was executed.

12. Vendor and purchaser ⇨123

In action to rescind contract for sale of lot, judgment against vendor should have provided for cancellation and surrender to vendor of purchaser's contract.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by George B. Shaffer, as executor of the estate of Maria Meisrimel Lapham, deceased, and others, against the Security Trust & Savings Bank, now the Security-First National Bank of Los Angeles. From a judgment for plaintiffs, defendant appeals.

Modified and affirmed.

Howard F. Shepherd and John F. Bender, both of Los Angeles, for appellant.

John C. Gillham, Lyndol L. Young, and Young & Young, all of Los Angeles, for respondents.

MARKS, Justice.

Plaintiffs secured judgment against defendant in the sum of \$3,747.20, being the total sum paid under the terms of an executory contract for the sale of real property between defendant and Maria Meisrimel Lapham, now deceased. This judgment is now before us for review.

The following grounds for a reversal of the judgment are presented: (1) The evidence was insufficient as a matter of law to support the judgment, as it does not show that Mrs. Lapham was of unsound mind at the time she executed the contract. (2) A notice of rescission was necessary. The individual plaintiffs gave none. The notice given by the executor was ineffective, as it was given without authority either of law or the probate court. (3) The agreement to purchase the real property was part of a concurrent agreement to make a loan, and plaintiffs could not rescind the purchase and retain the benefits of the loan. (4) Since no money was paid by Mrs. Lapham, who gave a note secured by a mortgage, a money judgment was improper. (5) Plaintiffs ratified the agreement of purchase. (6) Plaintiffs lost the right of rescission through laches. (7) Money judgment, if any, should have been against defendant as trustee. (8) Judgment does not place the parties in status quo because (a) it does not credit the defendant with a loss in the sum of \$450 sustained in the sale of the note and mortgage given by Mrs. Lapham, and (b) because it is for money only and does not decree the rescission and cancellation of the contract of purchase and sale.

The questions presented on this appeal require a detailed summary of the evidence.

The contract of purchase bore the date of May 25, 1928. At that time Mrs. Lapham, a widow, was of the age of seventy-three years. The evidence fully justifies the finding of the trial court that she "was mentally weak and mentally infirm, and that, though not insane, was by reason of such old age, weakness of mind and mental infirmities unable, unassisted, to properly manage and take care of her property and unable to understand the nature of her acts in signing and executing said agreement of May 25th, 1928."

Mrs. Lapham was the owner of three lots upon which her home was located, appraised at \$7,000 in the probate proceedings, a half interest in a lot in Lennox appraised at \$2,500, a ranch in Texas, and personal property of little value. Her sole income was from rents of the Texas property, which did not exceed \$1,500 in any one year.

Mrs. Henrietta McKie was the owner of real estate in or near Culver City in Los Angeles county. A. J. Rigali and S. P. Veselich were real estate operators and subdividers with offices in the city of Los Angeles. They entered into negotiations with Mrs. McKie for the purchase of her property which resulted in the title being placed in defendant. Defendant executed a declaration of trust which provided security for the payment of the unpaid portion of the purchase price to her, the profits to Rigali and Veselich, and permitted the subdivision and sale of the property. The declaration of trust was not recorded.

Rigali and Veselich took possession of the property, subdivided it, and entered upon a selling campaign purportedly acting as agents for defendant. They conducted their operations by using lectures, lecture tents, luncheons, salesmen and saleswomen—the usual impedimenta of the promotional subdivider of that time. Mrs. Lapham was taken to the subdivision by a saleswoman, and on the first trip agreed to purchase the lot in question for \$7,000. Its dimensions were 25 feet by 120 feet, and was in a subdivision of 30 acres that had been used for growing beans. At the time of the trial in January, 1932, the tract had but three houses upon it. The trial judge found that on May 25, 1928, the lot had a reasonable market value of not more than \$2,500.

Mrs. Lapham had no money with which to buy the lot. She was told that, if she bought it, it could be sold in a short time at a substantial profit. Rigali and Veselich entered into a written agreement with Mrs. Lapham whereby she undertook to buy the lot in question for \$7,000, they to lend her \$4,500 evidenced by a note secured by a mortgage on her Texas property; \$3,500 was to be used as the down payment on the lot and the balance of \$1,000 to be held by Rigali and Veselich subject to the order of Mrs. Lapham. The note and mortgage were executed by Mrs. Lapham with the note drawing interest at 7 per cent. per annum.

Under the same date defendant and Mrs. Lapham executed a written contract for the sale of the lot to her for \$7,000, payable, \$3,500 in cash, the receipt whereof was acknowledged, and the balance in installments of \$70 per month commencing June 25, 1930. Deferred payments bore interest at 7 per cent. per annum, from date, payable quarterly. Mrs. Lapham further agreed to pay all taxes and assessments levied against the property. It will thus be seen that in this transaction she

assumed annual principal and interest payments of about \$1,400, when her annual income never exceeded \$1,500 and often was considerably less than that amount. In addition to these payments, it is obvious she would have to provide her living expenses and pay taxes and upkeep on her properties.

During the life of Mrs. Lapham, Rigali and Veselich paid her \$150, and also paid some taxes on the lot and interest on the contract with defendant out of the \$1,000 retained by them from the loan on the Texas property.

Mrs. Lapham died on January 11, 1929, and George B. Shaffer was appointed executor of her last will and testament. The parties plaintiff, other than Shaffer, are her heirs at law and the legatees under her will. The executor paid the installment of interest falling due on February 28, 1929, and during the same year paid taxes on the lot amounting to \$63.45. An inventory and appraisal of the property of the estate was made in which the "agreement with the Security Trust & Savings Bank * * *" was given a value of \$3,500.

On April 11, 1929, the executor through his attorneys asked Rigali and Veselich for an accounting of the \$1,000 retained by them on the loan to Mrs. Lapham. On April 27, 1929, they furnished a statement showing \$570 in their possession belonging to her. On May 3, 1929, this balance was paid to the executor. On January 17, 1930, Rigali and Veselich wrote the executor that the payments were not being kept up on the contract. On January 20, 1930, the attorneys for the executor wrote Rigali and Veselich that the executor expected to pay the interest in a short time. In April, 1930, the executor requested Rigali and Veselich to sell the lot, and gave them written authority to do so. On June 30, 1930, the executor gave defendant written notice of rescission of the contract, offered to return everything Mrs. Lapham had received, and demanded the return of the money paid on the lot. This action to rescind the contract and recover the payments made was filed by the executor on July 18, 1930. An amended complaint was filed on December 16, 1931, in which the heirs at law and legatees of Mrs. Lapham were joined as parties plaintiff. It is admitted that they gave no notice of rescission of the contract.

It should be noted that all of the negotiations for the sale of the lot to Mrs. Lapham were conducted by Rigali and Veselich and their employees. It is not contended that the defendant bank or any of its officers had any actual notice of the fraud or undue in-

fluence practiced by the realtors or that they actively participated in any of them. The sole responsibility of the defendant arises through its holding the legal title to the property, its execution of the contract of sale to Mrs. Lapham and its permitting Rigali and Veselich to act as selling agents of the property.

[1, 2] Defendant's contention is that the evidence is insufficient to support the judgment, as it does not establish that Mrs. Lapham was of unsound mind and lacked legal mental capacity at the time she entered into the contract. In 4 California Jurisprudence, 782, it is said: "When mental weakness, even though not amounting to absolute disqualification, is associated with inadequacy of consideration, undue influence or a mistaken impression as to the nature and effect of the instrument, the conjunction of any one of these elements is sufficient ground for cancellation." The following cases support this rule: *Moore v. Moore*, 56 Cal. 89; *Richards v. Donner*, 72 Cal. 207, 13 P. 584; *Wilson v. Moriarty*, 77 Cal. 596, 20 P. 134; *Hays v. Gloster*, 88 Cal. 560, 26 P. 367; *Longmire v. Kruger*, 80 Cal. App. 230, 251 P. 692; and *Bryson v. Gross*, 83 Cal. App. 638, 257 P. 137. The evidence supports the conclusion that Mrs. Lapham was suffering from weakness of mind arising largely from age and was grossly imposed upon in being induced to purchase for \$7,000 a small vacant lot that was never worth more than \$2,500 and in the transaction to assume indebtedness that she could never pay. This brings the case within the rule announced, and is sufficient evidence of mental disability, undue influence, and lack of adequate consideration to support the judgment.

[3, 4] Defendant next contends that, as a condition precedent to the institution of their action, it was incumbent on plaintiffs to restore, or to offer to restore, to defendant the thing of value which Mrs. Lapham had received, namely, an equitable interest in and right to purchase the lot in question. It is admitted that plaintiffs, other than the executor, did not offer to restore anything to defendant. It is urged that, while the executor did give a purported notice of rescission and offer to restore, it was a useless act, as he was serving in a representative capacity with his powers limited by law which gave him no right to dispose of any property of the estate without express authority of law and order of the probate court. He had no authority from the probate court to serve the notice of rescission or offer to restore to defendant any interest in the lot in question.

It is too well settled in California to permit of question that as a general rule a notice of rescission and an offer to restore must be given or a restoration of the property must be made before an action for rescission can be maintained. It is as equally well settled that there are equally well-settled exceptions to this general rule. Some of them are set forth in *Kelley v. Owens*, 120 Cal. 502, 47 P. 369, 371, 52 P. 797, where the Supreme Court said: "There are exceptional cases where restoration or an offer to restore before suit brought is not necessary, as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties, or where the plaintiff has merely received the individual promissory note of the defendant, or where the contract is absolutely void, or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore, or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may, by a final decree, fully adjust the equities between the parties." See, also, *California, etc., Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 P. 593; *Matteson v. Wagoner*, 147 Cal. 739, 82 P. 436; *Rosemead Co. v. Shipley Co.*, 207 Cal. 414, 278 P. 1038; 4 Cal. Jur. 767, § 9, and cases cited.

The case of *Norton v. Rosenkranz*, 62 Cal. App. 226, 216 P. 380, 381, is factually similar to the instant case on the question we are considering. There the plaintiff was purchasing under an executory contract of sale and purchase two lots and a house to be erected upon them. The house was not constructed according to specifications, and she brought her suit to rescind the contract and recover the money paid by her without restoring, or offering to restore, what she had received. The defendant made the identical contention that is made here. In concluding that restoration or an offer to restore was not a condition precedent to maintaining the action, the court said:

"It is next claimed that the evidence fails to show that the plaintiff ever accomplished a rescission of the contract, for the reason that she never restored or offered to restore the things of value she had received under the contract, as required by section 1691 of the Civil Code. The rule announced by this section is based upon the principle that he who seeks equity must do equity. In this connection it is well settled that any person demanding a rescission of a contract to which

he is a party must restore or offer to restore to the other whatever he may have received under the contract in the way of money, property or other consideration of benefit. It is only by doing this that he can entitle himself to the return of what he, on his part, may have given or paid, and to be released from the contract. Such, in effect, are the requirements of the section above referred to. Restoration to the status quo ante, however, is not essential in all instances. There are situations where the party who seeks to rescind has received nothing of value, and under such circumstances, as there is nothing to restore, the rule does not apply. *Larkin v. Mullen*, 128 Cal. 449, 60 P. 1091; *Spreckels v. Gorrill*, 152 Cal. 333, 92 P. 1011. In the instant case one of the things that it is claimed plaintiff received under the contract was the muniment of title evidenced by the executory contract here sought to be rescinded. It is admitted that plaintiff failed to tender a return of this instrument. In her complaint she sets forth that she received nothing, and the court so found.

"This contention presents the question whether or not under the circumstances of the case plaintiff was bound to surrender or offer to surrender her executory contract of sale to defendant before being entitled to rescind. In support of this claim it is in substance argued that plaintiff, by virtue of her contract, received an equitable title in and a lien upon the property, and the only means by which she could restore the defendant to his original status was by giving or tendering him a return of this instrument or a quitclaim deed relinquishing her interest, and that such tender was a condition precedent to her right of recovery.

"We see no merit in this contention. One seeking the rescission of a contract is not required to make a tender or offer of restoration of that which he would be entitled in any event to retain. Here plaintiff had conveyed to defendant her interest in the lots acquired by her under her original contract with defendant, and she was entitled to retain her contract evidencing this interest for her own protection in the event that rescission should be denied her. 2 Black on Rescission and Cancellation, § 621. It is not claimed that any sale was effected under the executory agreement, as the contract provided that a conveyance was to be made only upon full performance; but, even conceding, for the purpose of the case, that the outstanding unrecorded executory agreement constituted a cloud upon the title to the

property, and was therefore a thing of value within the meaning of the Code section, it was an interest which plaintiff had acquired, and one she was entitled to retain by reason of her payments, and until a determination of her rights was had she was not bound to relinquish this evidence of interest.

"In conformity with this view it has been held that, where a plaintiff was seised in fee of two pieces of land, and was induced by fraudulent representations as to his title to relinquish one piece in consideration of a deed to the other, in order to maintain an action to set aside his conveyance of the one piece upon discovery of the fraud, it was not necessary to restore the other so as to put the parties in statu quo. *Du Pont v. Du Bos*, 52 S. C. 244, 29 S. E. 665. See, also, *Matteson v. Wagoner*, 147 Cal. 739, 82 P. 436; *Wills v. Porter*, 132 Cal. 516, 64 P. 896; 2 Black on Rescission, p. 1432.

"The court had under the pleadings power to do exact justice between the parties and place them both in statu quo by adjudging their rights in and to the property, and its judgment determines such rights, and is res adjudicata upon the subject. This is all that plaintiff sought by her action. *Wills v. Porter*, supra; *Schneider v. Schneider*, 125 Iowa, 1, 98 N. W. 159." See, also, *Zeller v. Milligan*, 71 Cal. App. 617, 236 P. 349; *Rosemead Co. v. Shipley Co.*, supra.

The foregoing decisions furnish us ample authority for concluding that under the facts of the instant case a notice of rescission and offer to restore or restoration was not a necessary prerequisite to maintaining this action. This conclusion makes it unnecessary for us to decide the legal effect of the notice of rescission and offer to restore given by the executor.

[5] We cannot agree with the contention of defendant that the contracts of Mrs. Lapham with Rigali and Veselich for the loan and defendant for the purchase were part and parcel of the same transaction must be considered together, and that the one cannot be rescinded without rescinding the other. The agreement between Rigali and Veselich and Mrs. Lapham for the loan was between them, and defendant had nothing to do with it. It provided for a loan by Rigali and Veselich to Mrs. Lapham of \$4,500 with her Texas property as security. It was understood that she was to purchase the lot here in question, but, we take it, this reference to the purchase of the lot was necessarily made to explain the understanding concerning the disposition of

the \$4,500, \$3,500 of which was to be paid by Rigali and Veselich to the owner of the lot (defendant), and the balance of \$1,000 to be held by them subject to the order of Mrs. Lapham. The contract of purchase executed by Mrs. Lapham and defendant was complete in itself, and made no reference to the loan agreement or to Rigali and Veselich. In so many words, it receipted to Mrs. Lapham for the down payment of \$3,500. The source from which she obtained this money was entirely immaterial as far as her contract with defendant is concerned. The fact that a large part of this down payment was returned to Rigali and Veselich by defendant (probably almost \$2,800) was also immaterial as far as Mrs. Lapham and her contract of purchase is concerned. This was done under the terms of the declaration of trust which was unrecorded and of which Mrs. Lapham had no notice. The contract between Mrs. Lapham and defendant had no reference to the loan agreement or to Rigali and Veselich, and, to maintain the action against defendant, it was not necessary to join the realtors as defendants or to restore to them anything Mrs. Lapham had received from them under her separate agreement with them. *Gilson Quartz Mining Co. v. Gilson*, 47 Cal. 597.

[6] The foregoing also disposes of the contention that a money judgment against defendant was improper because Mrs. Lapham did not pay it any money. Of course, she did not physically hand this money to defendant. She created a fund in the hands of Rigali and Veselich out of which the payment was to be made. They agreed to make the payment out of this fund, and defendant receipted to Mrs. Lapham for the money. The payment was made by her just as surely as though Rigali and Veselich had handed her the \$3,500 upon completion of the mortgage transaction and she had handed defendant the same money.

[7] Defendant seriously contends that plaintiffs ratified the transaction after the death of Mrs. Lapham by the course of conduct we have already outlined. It is urged that they had notice of her mental infirmities during the time they were treating the contract as a valid and binding obligation. This may be true, but there is ample evidence in the record supporting the finding of the trial court that during this time none of them had any knowledge that on May 25, 1928, the lot had a reasonable market value of only \$2,500 instead of \$7,000. Notice to them of the fraud and undue influence was not complete until they knew that Mrs. Lapham had been defrauded; in other words, until they learned

of the actual value of the lot. They did not learn of this value until a short time before this action was instituted.

[8] We cannot conclude that plaintiffs were guilty of any laches in view of the evidence and of the contrary finding of the trial court. The devisees and heirs at law of Mrs. Lapham lived in Europe. As soon as the executor learned all the circumstances of the sale and the value of the property, he communicated these facts to the heirs and asked for instructions. Shortly after these were received he gave notice of rescission and instituted this action. The finding against the defense of laches is amply supported by the evidence.

[9] The argument that the judgment could only be rendered against defendant as trustee and not in its individual capacity has been resolved against defendant by the case of *Wedge v. Security-First National Bank of Los Angeles*, 219 Cal. 113, 25 P.(2d) 411. This for the reason that defendant executed the contract in its individual capacity and not as trustee, that the declaration of trust was not recorded, and that Mrs. Lapham had no notice or knowledge of it.

[10, 11] The contention that the judgment should be reduced by \$450 cannot be sustained. Rigali and Veselich sold the note and mortgage of Mrs. Lapham at a discount of that amount. The loss was theirs and not that of defendant. The argument that a rescission cannot be had because the lot had depreciated in value between 40 and 50 per cent. during the years of depression cannot avail defendant. The rescission goes back to the date the contract was executed. The fraud was committed and the undue influence exerted upon her at that time. That the market value of all real estate, including the lot in question, depreciated sharply, was no fault of Mrs. Lapham or the plaintiffs. It might be remarked that the money which defendant must pay plaintiffs has also depreciated in value about 40 per cent. since the date when the payments were made to it.

[12] We have concluded that the final contention of defendant that the judgment should have provided for the cancellation and surrender of the contract of purchase must be sustained. Such a contract gives the purchaser an equitable interest in property. In order to put the parties in the position they occupied before it was executed, the judgment should have provided that the contract be canceled and surrendered to defendant in

addition to directing that the money paid be refunded by defendant.

It is ordered that the judgment be modified by the trial court by adding to it a provision that the contract dated May 25, 1928, between Security Trust & Savings Bank, a corporation, party of the first part and seller, and Maria M. Lapham, a widow, party of the second part and buyer, whereby the seller agreed to sell and the buyer agreed to buy lot 6 of tract No. 9648, as per map recorded in Book 142, pages 13 to 15, both inclusive, of Maps, in the office of the county recorder of Los Angeles county, be canceled, and declared null and void and be surrendered by plaintiffs to defendant, and as so modified the judgment is affirmed. The parties will pay their own costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.



4 Cal.App.2d 630

GUSTAFSON et al. v. BLUNK et al.

Civ. 8906.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1935.

Rehearing Denied March 19, 1935.

Hearing Denied by Supreme Court
April 18, 1935.

1. Automobiles ⇨244(6, 36, 49)

In action for death of pedestrian struck by automobile as he was crossing street, evidence held to show that deceased was not negligent, that automobile driver was negligent in not seeing pedestrian and avoiding him, and that accident was caused by sole, direct, and proximate negligence of driver.

2. Trial ⇨397(1)

Where defendants in action for death of pedestrian struck by automobile pleaded contributory negligence as affirmative defense, finding thereon should have been made, since court, when findings are not waived, must find on all material issues, and contributory negligence was material issue.

3. Trial ⇨400(2)

Order changing and adding to findings to make them conform to proof to cure court's omission to make finding on contributory negligence in action for death in automobile collision held invalid, where made after expira-

tion of 60-day period within which trial court can act on motion for new trial (Code Civ. Proc. § 662).

4. Appeal and error ⇨1071(6)

In action for death of pedestrian struck by automobile, error in failure to make finding as to contributory negligence *held* not prejudicial, where reviewing court under evidence was required to make finding that pedestrian was not contributorily negligent (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

5. Death ⇨58(1)

In action for death of pedestrian struck by automobile, it will be presumed that deceased used ordinary care for his own safety, and that in doing so he looked for approaching vehicles, where there was no direct evidence as to whether he looked.

6. Appeal and error ⇨1122(2)

Where evidence supported finding that deceased pedestrian was not contributorily negligent and that negligence of automobile driver was sole, direct, and proximate cause of collision and injury, reviewing court had right and obligation to make such finding when necessary to affirmance of judgment (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

7. Trial ⇨394(1)

Requirement of statute that findings of fact and conclusions of law shall be separately stated is merely directory, and if correct findings and conclusions are made they will be construed in their true character irrespective of classification in which they may be included (Code Civ. Proc. § 633).

8. Trial ⇨404(2)

Finding of fact as to amount of damages *held* sufficient though erroneously classified as conclusion of law (Code Civ. Proc. § 633).

9. Death ⇨77

Evidence showing loss of service to wife and other heirs at law of deceased *held* to sustain judgment, in action for damages for death, that pecuniary value thereof was \$4,000.

Appeal from Superior Court, Los Angeles County; V. N. Thompson, Judge.

Action by Ingrid B. Gustafson and others against Harry Blunk and another. From an adverse judgment, defendants appeal.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

William Christensen, of Los Angeles, for respondents.

ROTH, Justice pro tem.

Respondents are the wife and children of one David Gustafson, deceased. Deceased and an automobile operated by appellants collided as a result of which deceased was instantly killed.

The action was tried by the court sitting without a jury. Since judgment was rendered in favor of plaintiffs, respondents here, it is apparent that the trial court viewed the evidence as to how the collision occurred most favorably to the respondents. There is little conflict as to the salient features of the evidence. The record shows that the deceased, a man 74 years old, in normal health and of normal eyesight and hearing, on November 13, 1931, at approximately 7 o'clock p. m. was walking from west to east across Atlantic boulevard at its intersection with Bell avenue in the city of Bell, county of Los Angeles. He reached a point at or near the center line of Atlantic when the left front fender of a Buick coupé, traveling in a northerly direction and driven by appellant Harry Blunk at approximately 35 miles per hour, struck him and threw him onto the left front fender, from which place his body was hurled in a southerly direction striking and shattering the left wind wing and the glass of the left side door, and making an appreciable dent in the left side door panel and post. The evidence shows no damage to the bumper, lights, radiator, or hood of the automobile. The deceased fell to the left, and when his body was picked up approximately 40 feet from the place of impact, his head was lying on the white center line of Atlantic, and the balance of his body east of the white center line. Subsequent examination of the deceased showed that all the injuries he received were on the right side of the body, and that there were no injuries below the knees. There were no broken bones, except that the right side of the skull at or near the right temple or right parietal region was fractured. The driver of the Buick testified he did not see the deceased and that the deceased was not within range of his headlights. An eyewitness, after stating that the Buick in question passed him "pretty fast," testified that as the deceased approached the center line of Atlantic he "seemed to hesitate, and no more than that then the Buick struck him and threw his feet up over his head." The same witness testified he had a conversation with Blunk and asked him "how he came to hit the old man," to which Blunk responded: "I didn't see him." As already suggested, this statement was subsequently verified by Blunk's own testimony.

The street was well lighted and the visibility good. Two other motorists testified they saw deceased from a distance approximately 150 feet south of the point of impact. There is no testimony that the deceased at any time crossed the white line which marked the center of the street. Defendant Blunk testified he was driving on the right side of the road about midway between the curb and the white center line, and that he drove along in that position without turning to the right or left at any time before the collision. There is no contention that Blunk was blinded by approaching headlights, or that his vision was in any way obstructed. The trial court found as a fact that the appellants "so carelessly and negligently drove and operated the * * * automobile as to * * * run into and against and to collide with" the deceased.

[1] We feel that the trial court was justified in concluding from the evidence thus summarized, as it obviously did, that the deceased either walking slowly to the center line or stopping on the center line, and thus moving slowly to the center line or waiting on the center line for traffic moving from the south to the north to pass, was not negligent, and that the defendant Blunk as a reasonably prudent and careful driver should have seen deceased and avoided him; and that there was therefore no negligence on the part of the deceased, and that the accident was caused by the sole, direct, and proximate negligence of appellant Blunk.

Our conclusion to this effect disposes of appellants' points that the evidence does not support the findings of the court with reference to their liability and responsibility for the accident, as well as the contention of appellants that the deceased was guilty of negligence as a matter of law.

[2] Appellants pleaded contributory negligence as an affirmative defense; the court made no finding on this issue, and it is now contended that the judgment must be reversed for this reason. Generally speaking, a court when findings are not waived must find on all material issues. Contributory negligence, is, of course, a material issue (*Cargnani v. Cargnani*, 16 Cal. App. 96, 116 P. 306), and a finding thereon should have been made.

[3, 4] To cure this omission the court, assuming to proceed under section 662, Code of Civil Procedure, made an order changing and adding to the findings so as to make them conform to the proof, and the findings as so changed and added to specifically declare that the deceased was not guilty of contributory

negligence. The order, however, was invalid, as it was made after the expiration of the 60-day period within which a trial court can act upon a motion for a new trial. In view of the record, however, this error is not fatal.

[5] Appellants' plea of contributory negligence is based upon their conclusion from the facts which have been summarized and which comprise all of the important facts, that decedent walked into the automobile and was not hit by the automobile as the trial court found. Other than inferences which might be drawn from the facts summarized, there is no evidence that the decedent was negligent in any respect, and there is no testimony that he walked into the side of the automobile. The testimony of one eyewitness was directly to the effect that he was hit by the front of the automobile and his legs thrown over his head. Harry Blunk, who drove the car, testified: "The first thing I knew that I had hit anything was that it (the left wind-wing) all splintered, and it flew in my face. * * *" The same witness testified when his attention was called to a dent on the top front fender, that it was not there before the accident. These facts testified to by the driver of the automobile impel the almost inescapable conclusion that the decedent was hit by the left front fender, but that the original collision was brought to the attention of the driver when the body of the deceased hurtled through the air, struck the left wind wing and shattered glass in his face. There is no testimony indicating whether decedent stopped, looked, and listened before leaving the sidewalk, or whether he looked, as he walked toward the white line that marked the center of the street, to his right or his left. There is no testimony that he took as much as one step east of the center line. There is testimony that he walked up to the center line and never got beyond it. The fact that his head was on the center line and his body east of the same, at the point in the street where the body was finally deposited after having been carried a minimum of 40 feet, would not justify a conclusion that he did get east of the center line before he was hit. The language of the court in the case of *Tieman v. Red Top Cab Co.*, 117 Cal. App. 40, 45, 3 P.(2d) 381, 383, is peculiarly appropriate: "There is no direct testimony as to whether decedent looked before leaving the sidewalk, although his stopping would support an inference that he knew the taxicab was approaching. In absence of contrary evidence, it must be presumed that he used ordinary care for his own safety, and that, in so doing, he looked."

[6] This evidence supports a finding that the deceased was not guilty of contributory negligence or any negligence which contributed directly to the collision or was a proximate cause thereof, and that the negligence of the appellant Blunk was the sole, direct, and proximate cause of the collision and the injuries which ensued. Under the authority vested in this court by section 4¾ of article 6 of the Constitution, and by section 956a of the Code of Civil Procedure, as interpreted in *Tupman v. Haberkern*, 203 Cal. 256, 280 P. 970, we have the right and the obligation, under appropriate evidence, to make this finding when it is necessary to an affirmance of the judgment, and we do so find and hereby amend the findings to that effect. It is therefore unnecessary to reverse the judgment because of the failure of the trial court to find on the issue of contributory negligence. See, also, *City of Pasadena v. Estrin*, 212 Cal. 231, 236, 298 P. 14; 1932 Supp. Cal. Jur., Appeal & Error, 588 (a).

[7, 8] The findings are further attacked in that the trial court found that the respondents were damaged, but did not say how much. The conclusions of law, however, set forth specifically the amount of damages. It is well settled that the requirements of the statute that findings of fact and conclusions of law shall be separately stated is merely directory. If, therefore, correct findings of fact and conclusions of law are made, they will be construed in their true character irrespective of the classification in which they may be included. If matter is set forth as a conclusion of law but should properly have been set forth as a finding of fact, it will nevertheless be construed as a finding of fact. The case of *Linberg v. Stanto*, 211 Cal. 771, 297 P. 9, 11, 75 A. L. R. 555, is on all fours as to this proposition with the facts in the instant case. In the *Linberg* Case the court says at page 776 of 211 Cal., 297 P. 9, 11:

"The alleged conclusion of law was of itself a finding as to plaintiff's damages. It is well settled, in spite of the fact that section 633 of the Code of Civil Procedure provides that facts and conclusions must be separately stated, that a finding may be regarded as one of fact, although mistakenly placed among the conclusions of law. 24 Cal. Jur., p. 960, § 199. We think that is the situation here.

"Moreover, if the findings are deficient in this respect, this court since the addition in 1927 * * * of section 956a to the Code of Civil Procedure has the power in a proper case to make new or additional findings in

support of the judgment of the lower court. * * * See, also, *Warden v. Stoll*, 210 Cal. 374, 376, 291 P. 835.

We feel, however, that the finding of fact erroneously classified as a conclusion of law is sufficient as a finding of fact, and that it is not necessary to make any other finding in this regard. *Butler v. Agnew*, 9 Cal. App. 327, 99 P. 395; *Jessen v. Peterson, Nelson & Co.*, 18 Cal. App. 349, 123 P. 219; *Roloff v. Hundebly*, 105 Cal. App. 645, 288 P. 702.

[9] There is ample evidence in the record showing loss of service to the wife and the other heirs at law of the deceased to sustain the judgment of the court that the pecuniary value thereof was \$4,000. There is no merit to the point appellants raise on this issue.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



4 Cal.App.2d 766

**CITIZENS' NAT. TRUST & SAVINGS BANK
OF LOS ANGELES v. SEABOARD SURE-
TY CORPORATION OF AMERICA.**

Civ. 8847.

District Court of Appeal, Second District,
Division 1, California.

Feb. 26, 1935.

Hearing Denied by Supreme Court
April 26, 1935.

1. Guaranty **36(3)**

Guarantor's agreement, providing there should be no liability if obligee should collect note from principals or any of them, held "guaranty of collectability" and not "guaranty of payment" (Civ. Code, §§ 2800, 2807).

[Ed. Note.—For other definitions of "Guaranty of Collection" and "Guaranty of Payment," see Words & Phrases.]

2. Guaranty **81**

Action on guaranty of collectability of note held prematurely brought before plaintiff's judgment against maker was entered, since such guaranty did not accrue immediately upon default of principal (Civ. Code, §§ 2800, 2807).

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

Action by the Citizens' National Trust & Savings Bank of Los Angeles against the

Seaboard Surety Corporation of America.
From an adverse judgment, plaintiff appeals.
Affirmed.

Mott, Vallee & Grant, and J. Edward Haley, all of Los Angeles, for appellant.

Lawrence M. Cahill, John A. Holland, and Arthur T. Stollmack, all of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Bessolo & Gualano, Inc., made a note payable to itself in the principal sum of \$13,500 which was guaranteed by Angelo Bessolo, V. A. Gualano, and M. Angelo Bessolo, Jr. This note was thereafter transferred to the plaintiff bank, together with a bond of the defendant sued upon in this action. This bond names the three individuals and the corporation as principals, and itself as surety, and recites that they are bound unto J. M. Berry, and any and all further holders of the note, in the sum of \$13,500 upon the condition "that if the Obligee shall collect said note from said Principals or any of them, then this obligation shall be void, otherwise to remain in full force and effect." The defendant asserts that this is a guaranty of collectability and not a guaranty of payment, and the appeal is from a judgment based upon the conclusion of law of the trial court, finding this to be the legal effect of the instrument and the action to have been prematurely brought.

The appeal is on the judgment roll and the facts are undisputed. The trial court found that the note and bond had been executed and delivered as alleged by plaintiff, and had been accepted by the plaintiff before maturity, in good faith, for value, and in the usual and regular course of business; that no part of the principal or interest on the note had been paid, and that on June 9, 1929, when the note became due, plaintiff made demand upon the maker and guarantors thereof; that on August 2, 1929, plaintiff notified the defendant of the nonpayment of the note, and demanded payment from it as surety; that on August 19, 1929, plaintiff commenced an action against the makers and guarantors of the note and recovered judgment thereon; that an appeal to this court was taken by the defendants from that judgment, but without the filing of any bond staying execution; and that the appeal was then pending and undetermined.

In response to the issues raised by defendant's answer, the trial court found it not to be true that plaintiff failed and neglected to proceed to collect the note. It also found the plaintiff bank had not been negligent and

dilatory in its efforts to collect the note, and that the defendant surety company had not been exonerated from liability by reason of any acts on the part of plaintiff.

In Corpus Juris it is said that: "Where the guaranty is of the collection or of the collectability of the bill or note, it is generally held to be a conditional guaranty; it is equivalent to a guaranty that the bill or note is collectable by due course of law, and the guarantor is bound only upon condition that the drawee or payee of the bill or note uses due diligence to collect the debt from the drawer or maker, and gives the guarantor notice of the principal's default." 28 C. J. 951. If the payee of a negotiable note indorses it, "I hereby guarantee the collection of the within at maturity," only a conditional guaranty is created. The indorsement, "We guarantee the collection of the within note," is of the same kind. A guaranty of the collection of the amount of a debt as it becomes due is likewise an undertaking that the debt will be paid if the principal is prosecuted with reasonable diligence. Cases where the foregoing were passed upon are collected in a note to Fall v. Youmans, 64 Am. St. Rep. 390, 394. In Phillips v. Lindley, 112 App. Div. 283, 98 N. Y. S. 423, 425, the defendant made an agreement "to collect said note without cost of expense to said Phillips." It was held to be a conditional guaranty. The words, "I guaranty the collection of this note to George Leitch," were also held to create a conditional guaranty. Cumpston v. McNair, 1 Wend. (N. Y.) 457.

The Civil Code recognizes a guaranty of payment as a very different one from a guaranty of collectability. "A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." Civil Code, § 2807. "A guaranty to the effect that an obligation is good, or is collectable, imports that the debtor is solvent, and that the demand is collectable by the usual legal proceedings, if taken with reasonable diligence." Civil Code, § 2800.

[1] The obligation of the defendant in this case is not unconditional. It provides that there shall be no liability "if the Obligee shall collect said note from said Principals or any of them." This is clearly a guarantee of collectability and not of payment. In the case of Nimmo v. Fitzgerald, 202 Cal. 565, 261 P. 1015, 1016, it was alleged in a counterclaim that the sellers of accounts represented and warranted that each and every one of them was good and collectable. The court

said: "The counterclaim does not state a cause of action. It alleges that the sellers 'warranted to the defendants that each of said accounts receivable was collectible, and agreed and guaranteed that the defendants would receive the money represented by said accounts receivable; that the defendants * * * attempted to collect each and every one of the aforesaid accounts, * * * but have been unable to collect any part of the same; * * * that the balance due upon said accounts * * * is still uncollected, due, owing, and unpaid to the defendants. * * * These allegations do not tender an issue. * * * Here the allegation is merely that defendants attempted to collect the accounts, but were unable to do so. There is no allegation that they were not good or collectible, or that the claims had been reduced to judgment, and execution thereon returned unsatisfied, or that the debtors were insolvent, and it would be futile to prosecute them." See, also, *Menefee v. Robert A. Klein & Co.*, 121 Cal. App. 294, 9 P.(2d) 219.

[2] Being a guaranty of collectability, the liability of the defendant did not accrue immediately upon the default of the principal. The complaint in this action was filed some six months before plaintiff's judgment against the maker and guarantors was entered in the superior court, and while an appeal from that judgment was pending, this action was tried. There was no attempt to show that either the maker was or the guarantors were insolvent, or that the debt could not be collected from them. The action was therefore premature, as held by the trial court.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



5 Cal.App.2d 16

**BUTTERFIELD CONST. CO. v. FEDERAL
LAND VALUE INS. CO.**

Civ. 1158.

District Court of Appeal, Fourth District,
California.

Feb. 27, 1935.

Rehearing Denied March 28, 1935.

1. Insurance ⇨128(1)

Land value insurance company held not liable for loss sustained by street contractor

because of failure to execute policy, where hazard insured against was default in payment of interest and principal of bonds without regard to actual value of land, or of lien of bondholder therein since "land value insurance" only includes insuring of, or guaranteeing land values (Pol. Code, § 594; Civ. Code, §§ 453hh, 1636).

2. Insurance ⇨146(3)

While language used in insurance contracts must be construed most strongly against insurer, where their provisions are reasonably susceptible to double meaning, court must apply intention of parties (Civ. Code, § 1636).

3. Contracts ⇨134

Estoppel ⇨78(1)

Contract which is void because it stipulates for doing what law prohibits is incapable of being ratified, and cannot create an estoppel.

Appeal from Superior Court, San Diego County; Clarence Harden and C. N. Andrews, Judges.

Action by the Butterfield Construction Company against the Federal Land Value Insurance Company. From a judgment for defendant, and from an order denying plaintiff's motion for new trial, plaintiff appeals.

Judgment affirmed, and attempted appeal from order denying plaintiff's motion for new trial dismissed.

Sanders & Jacques, of San Diego, for appellant.

Paul A. McCarthy, Frank L. Guereña, and John H. Riordan, all of San Francisco, for respondent.

ALLYN, Justice pro tem.

The plaintiff and appellant, a street contractor, before submitting a bid to the city of San Diego for certain street work then pending under the Improvement Act of 1911 (St. 1911, p. 730, as amended), negotiated with defendant, a land value insurance company, for the issuance of insurance policies on the various parcels and lots of land within the improvement district. It was necessary for plaintiff to finance its operations, if it was successful in securing the contract, to get an advance commitment from some concern dealing in securities of this kind to purchase the warrant, assessment, and bonds to be thereafter issued under the terms of the act. It was thought that if policies of land value insurance might be issued upon each piece or

parcel of property against which a bond should thereafter issue, the value of these bonds would be enhanced. A sample policy of insurance was submitted and it was agreed that such policies should be issued, in the event plaintiff were successful in securing the contract, in amounts 10 per cent. in excess of the amounts due on the bond or bonds. Defendant repudiated its agreement and plaintiff, having been awarded the contract, was compelled to default. In an action for damages for breach of contract, the trial court found for plaintiff on all issues as to the contract, the breach thereof, and plaintiff's damage, but found that the form of insurance agreed upon was not land value insurance and hence beyond the corporate powers of defendant. Judgment was entered for the defendant and plaintiff appeals therefrom.

The determination of this appeal rests upon the solution of one problem, namely, Was the agreed form of policy one of land value insurance? If it was not, the agreement to issue it was clearly beyond the corporate powers of the defendant and in direct violation of the statute upon which defendant's corporate existence depended. Pol. Code, § 594; Civ. Code, § 453hh.

There is little conflict in the testimony as to what transpired or as to what the parties were really trying to accomplish. They were all trying to fit land value insurance to 1911 Improvement Act proceedings so that the bonds issued thereunder might be more salable by reason of insurance against loss by depreciation of value of the land. In their discussions and correspondence it was variously termed "land value insurance" and "insurance on bonds."

The proposed policy undertakes to insure the purchaser and his assigns of "a certain right, title, interest or lien in or upon" certain real property against loss on subsequent sale which "insured shall sustain by reason of the market value of said right, title or lien having depreciated to a sum less than a maximum amount" at any time during the term of the policy. The insured has the right at any time during the term to make proof of the loss through depreciation of market value and, upon payment of a given amount thereof, agrees to constitute the insurer its exclusive agent to sell and dispose of the interest in the property. If the interest has not been disposed of by a certain date, the insurer undertakes to pay a further sum and, in consideration thereof, is to be given a longer time to sell, said agency to be continued by payment of successive amounts at given dates. It is apparent that the times and amounts of

these payments are to be fixed as the payment dates and amounts of payment as they come due under the terms of the bonds. Upon maturity of the policy, insurer, upon transfer to it of insured's right, title, and interest in and to the property, agrees to pay the latter or face of the policy, plus interest and less the amounts theretofore paid.

Condition No. 5 of the policy waives the right of insured to claim loss so long as it receives the stipulated return of principal and interest on the bond. If six months' default is made on any installment of interest or principal of insured's indebtedness, upon presentation of bond and coupon, a settlement option is provided in the policy whereby the bondholder may, in the event of a default, surrender his bond and coupons and receive in full settlement an amount equal to the principal and interest then owing on the bond and coupons, and, thereupon, the insurer shall be subrogated to the rights of the insured.

[1] Without attempting to determine whether by the law of California an owner of a bond issued under the Improvement Act of 1911 has an insurable interest in the value of the land upon which the bond is a lien, it is quite apparent that the parties actually accomplished an agreement for insurance of the payment of the principal and interest installments of the bonds. This does not appear to be possible under our law, which classifies all insurance business into twenty forms or classes. Pol. Code, § 594. Under the agreed form of policy, there can be no doubt that the risk or hazard insured against was the default in payment of interest and principal of the bond, without regard to the actual value of the land itself or of the lien of the bondholder therein.

[2, 3] While it is true that the language used in insurance contracts must be construed more strongly against the insurer where their provisions are reasonably susceptible to double meanings, it is the duty of the court to establish and apply the intention of the parties. *Ponder v. Lamar Life Ins. Co.* (D. C.) 6 F. (2d) 294; Civ. Code, § 1636.

Since the finding of the trial court, that the insurance agreed upon was bond insurance and not land value insurance, must be sustained, it follows that the agreement was beyond the statutory, as well as the charter, powers of the defendant. Land value insurance includes within its meaning the insuring of or guaranteeing land values. Companies doing this class of insurance are expressly prohibited from engaging in any other form of insurance. Pol. Code, § 594. A contract void because it stipulates for doing what the

law prohibits is incapable of being ratified and, further, cannot create an estoppel. *Wood v. Imperial Irrigation Dist.*, 216 Cal. 748, 17 P.(2d) 128.

The action of the trial court in striking the second cause of action from the third amended complaint, said cause of action attempting to recover loss of prospective profits on the street improvement contract, is sustained by the foregoing reasons.

The judgment is affirmed and the attempted appeal from the order denying plaintiff's motion for new trial is dismissed.

We concur: BARNARD, P. J.; MARKS, J.



5 Cal.App.2d 1

**JACOBS et al. v. FARMERS' MUT. FIRE
INS. CO. OF TURLOCK, Inc.**
Civ. 5051.

District Court of Appeal, Third District,
California.
Feb. 26, 1935.

Rehearing Denied March 27, 1935.

1. Insurance ⇨669(12)

Instructing that measure of insured's recovery under fire policy was entire cash value of property destroyed *held* error where policy provided that insurer would not be liable beyond three-quarters actual cash value of interest of insured in property at time of loss.

2. Insurance ⇨612(3)

Under fire policy provision that if parties could not agree on amount of loss, they should submit question to arbitration, amount of loss *held* not required to be submitted to arbitration as prerequisite to maintenance of action on policy where there was no dispute regarding amount of loss.

3. Insurance ⇨559(1)

Insurer which repudiated obligation on fire policy by asserting that policy was rendered void because insured fraudulently represented values of property and because insured subsequently mortgaged personalty and secured additional insurance and willfully burned property waived provision of policy requiring submission to arbitration of amount of loss.

4. Insurance ⇨640(5)

Insurer waived defense of failure to submit insured's loss to arbitration by neglect-

ing to specifically allege or prove lack of arbitration.

5. Insurance ⇨330(4)

Insurer could not escape liability on fire policy on ground that personalty was encumbered by chattel mortgage where at time of fire no chattel mortgage existed on property (Civ. Code, §§ 2956, 2973).

6. Appeal and error ⇨1066

In action on fire policy which provided that insurer would not be liable while property was encumbered by chattel mortgage, alleged error in instructing that chattel mortgage is an instrument in writing *held* harmless where at time of fire no chattel mortgage existed on property (Civ. Code, §§ 2956, 2973).

7. Contracts ⇨147(1)

Construction of contract depends on intention of parties thereto.

8. Insurance ⇨336(7)

Fire policy *held* not rendered void for double insurance because insured after issuance of policy acquired other insurance for valuable rugs and linen, under circumstances showing that insured intended to separately insure only rugs and linen and was not aware that subsequent policy also included personalty previously insured.

Circumstances disclosed that more than two years after the fire policy was issued, the insured purchased two valuable Persian handmade rugs, one handmade linen bedspread, and certain table linen and immediately insured them with an agent of an insurance company in San Francisco where insured lived at the time, that the insured attempted to insure the rugs and linen separately, but the agent merely told the insured that the insurance company would insure them as household goods, that the insured never made a claim to the defendant insurance company for damages for loss of those rugs and linen, and that no claim was ever made to defendant for loss on the rugs and linen.

9. Appeal and error ⇨1050(1)

In action on fire policy, admission of proof of loss which was filed with another insurer for damages for burning of rugs and linen which had been subsequently insured *held* not prejudicial where such items were omitted from proof of loss filed with defendant insurer.

10. Insurance ⇨323(3)

Fire policy excepting liability if dwelling remained vacant or unoccupied for more than thirty consecutive days *held* not voided because insured dwelling house was unoccupied at time of fire where insured's parents

lived on premises and continuously occupied dwelling house except that for not more than ten days during hot nights they temporarily slept in tank house adjacent to dwelling house.

Whether a dwelling house is "occupied" or "vacant" must depend on facts of each particular case. In general, a dwelling house is "occupied" when human beings habitually live in it as a place of abode. When it ceases to be used for living purposes or as a customary place of human habitation, it is unoccupied. It is not necessary that some person shall live in the house continuously, but it must be a usual place of abode and there must not be a cessation of occupancy for any considerable length of time.

[Ed. Note.—For other definitions of "Occupied" and "Vacancy; Vacant; Vacate," see Words & Phrases.]

11. Insurance ⇨598

When evidence shows total loss of property insured and compliance with all terms of policy on part of insured except such as have been waived by insurer, interest is properly included on amount of obligation due under policy from date when loss is payable (Civ. Code, § 3287).

12. Insurance ⇨598

Insurer's unwarranted denial of validity of policy will not defeat right to recover interest otherwise recoverable (Civ. Code, § 3287).

13. Insurance ⇨598

Obligation to pay interest on amount recoverable on policy is imposed on insurer if it fails to establish invalidity of policy because of asserted breach thereof by insured (Civ. Code, § 3287).

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by John Jacobs and another against the Farmers' Mutual Fire Insurance Company of Turlock, Inc., a corporation. Judgment for plaintiffs, and defendant appeals.

Reversed and cause remanded for new trial.

Percy V. Long and Bert W. Levit, both of San Francisco, and Samuel V. Cornell, of Turlock, for appellants.

Albert Picard, of San Francisco (Francis McCarty, of San Francisco, of counsel), for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment for damages which was rendered against it in a suit on an insurance policy for loss sustained on account of a fire.

The plaintiffs are brothers. They were joint owners of a small farm at Turlock upon which there was a furnished dwelling house. The property was occupied by their parents. October 25, 1928, the defendant insured the house for \$2,500 for a three-year term. The same policy insured the household furniture for the further sum of \$1,500. September 27, 1929, John Jacobs sold and conveyed his undivided one-half interest in the real and personal property to his brother Jonathan for the sum of \$3,800. In payment of this purchase price, Jonathan executed and delivered to his brother John a promissory note for that sum secured by a trust deed on the real property which is still unpaid. This transfer of interest in the property was subsequently approved by the insurance company. July 26, 1931, the dwelling house and furniture were entirely destroyed by fire. On the morning following the fire, Mr. E. M. Morrow, the secretary and local adjuster of the defendant insurance company, who resides at Turlock, visited the premises and inspected the ruins. He promptly communicated with Mr. W. M. Way, the president of the company, who also has the duty of adjusting losses on account of fires. Mr. Way at once visited the premises and ascertained the fact that the dwelling house and furniture were almost entirely consumed by fire. July 28, 1931, the insurance company was served with a claim for damages for the loss by fire. August 24, 1931, the company was served with a sworn proof of loss in which each item was specifically mentioned and valued. The plaintiffs' claim of loss was rejected. The amount of the claim was not disputed. The company did not demand an arbitration of the claim. This suit upon the policy was commenced February 18, 1932. The defendant filed its answer denying all of the material allegations of the complaint, and affirmatively alleging that the policy was void for the reasons that the insured persons had made false declarations regarding the value of the property and concerning the contents of the building; that the property was burned as a result of the incendiary acts of the plaintiffs; that without the knowledge of the defendant the personal property was encumbered by a chattel mortgage; that without the written consent of

the defendant, the plaintiffs subsequently insured the personal property with another insurance company for the additional sum of \$3,000; and that the dwelling house was uninhabited at the time of the fire. The cause was tried with a jury which returned a verdict in favor of the plaintiffs in the full amount of the insurance upon both the dwelling house and the contents thereof. A judgment was rendered accordingly. The defendant made a motion for new trial on all the grounds authorized by section 657 of the Code of Civil Procedure, including that of excessive damages. The motion was denied. The defendant has appealed from the judgment.

The appellant contends that the court erred in refusing to grant a new trial, chiefly because the judgment for damages is excessive since it is for the full amount of the insurance contrary to the terms of the contract which specifically limit the liability to three-fourths of the "actual cash value" of the property. It is also asserted the judgment is not supported by the evidence; that the policy was rendered void by the subsequent mortgaging of the personal property and by securing additional insurance which was subsequently procured on the household equipment; that the amount of the loss was not first determined by arbitration as required by the policy; that interest was erroneously allowed on the principal amount of the judgment; and that the court erred in the admission of evidence and in the instructions which were given to the jury.

[1] We are of the opinion the court erred in denying the motion for a new trial for the reason that the award of damages is excessive, and it is necessary to reverse the judgment on that account. The insurance policy specifically provides: "This company will not be liable beyond the three-quarters actual cash value of the interest of the insured in the property at the time of loss."

The highest cash value of the dwelling house was testified to by the plaintiff John Jacobs as follows: "Q. What, in your opinion, was the actual cash value of that building on July 26th, 1931? A. If you ask me that question, I would say exactly \$3100.00."

The plaintiff Jonathan Jacobs testified that the actual cash value of the building at the time of the fire was \$2,500. Mr. Russell, who was called in behalf of the plaintiffs, testified that it was then worth \$2,750. There is substantial evidence to indicate that it was worth much less than \$2,500. There is a serious conflict of evidence on that subject. We are unable to ascertain from the record the actual

cash value of the dwelling house or furniture, at the time of the fire, with any degree of satisfaction. The limitation of liability fixed by the policy is but three-fourths of the actual cash value of the property at the time of the fire. The court erroneously instructed the jury that "the measure of plaintiff's recovery is the (entire) cash value of the property destroyed." The judgment is excessive. It is therefore necessary to reverse the judgment on that account.

For the aid of the court upon a retrial of the cause, we deem it advisable to determine the law with respect to the other controverted issues in the case.

[2, 3] It was not necessary to submit the question of the amount of damages sustained to arbitration as a necessary prerequisite to maintaining this action on the policy for the reason that there was no dispute regarding the amount of the loss of property. The policy provides that: "If * * * there is a failure of the parties to agree upon the amount of such damage or loss they shall submit the question of the amount of such loss to arbitration, and in that event the president of the company shall appoint one disinterested person to act as an arbitrator, and the claimant or insured shall appoint another. * * *" The plaintiffs filed with the insurance company their sworn proof of loss within thirty days of the time of the fire as required by the policy. They itemized the property which was destroyed and fixed their estimate of the value of each item. This claim contained no demand for damages for other property subsequently sought to be separately insured. They claimed damages for the full amount of their insurance with the defendant on account of a total loss of the property. Two of the agents of the company visited the premises immediately after the fire occurred and should be charged with knowledge of a total loss of the property. The defendant made no reply to the demand of the plaintiffs. The amount of damages claimed by the plaintiffs was not disputed. No demand for an arbitration of the amount of the claim was made by the defendant. No offer for a compromise was suggested. On the contrary, the entire claim was rejected. The defendant repudiated its obligation by asserting that the policy was rendered void for the alleged reasons that the plaintiffs fraudulently represented the values of the insured property, and because they subsequently mortgaged the personal property, secured additional duplicate insurance on the personal property, and willfully burned the property to procure the insurance. This con-

stitutes a waiver, on the part of the insurance company, of the provision of the policy with respect to arbitration. *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 P. 869, 17 Am. St. Rep. 233; 7 *Cooley's Briefs on Ins.* (2d Ed.) p. 6219. In the *Farnum Case* above cited the syllabus correctly announces the rule in that regard which was determined by the court, as follows: "When the policy provides for an arbitration of the amount of loss in case of a failure of the parties to agree, no arbitration is contemplated or required, except in that event; and if upon presentation of the proofs of loss by the assured the insurance company did not object to the amount or to the proofs, but denied its liability on other grounds, claiming that the policy did not exist, and that it had been canceled before the loss for non-payment of premium, this is sufficient evidence that the company acquiesced in the amount of loss claimed, and thereby waived its right to have it determined by arbitration."

[4] Moreover, the defendant waived the defense of failure on the part of the plaintiffs to submit their loss to arbitration by neglecting to either specifically allege or prove a lack of arbitration. 26 C. J., p. 502, § 706. The plaintiffs did allege that they had complied with all the provisions of the policy on their part. The answer merely denied generally that the plaintiffs had complied with all the provisions of the contract. So far as the evidence in this case is concerned, the arbitration may have actually occurred. The text of the authority last cited asserts in that regard: "Noncompliance with a condition of the policy making appraisal or arbitration of the amount of the loss a condition precedent to an action on the policy cannot be taken advantage of under the general issue or a general denial; it must be specially pleaded."

It will be observed that the policy in this case does not absolutely require arbitration as a condition precedent to the maintenance of an action. It is only when there is a dispute between the parties regarding the amount of the damages sustained that arbitration is required. The case of *Old Saucello Land & Dry Dock Co. v. Commercial Union Assurance Co.*, 66 Cal. 253, 5 P. 232, 233, relied on by the defendants, may be readily distinguished from the principle above announced. In the case last mentioned, the complaint specifically alleged "that a difference arose as to the amount of loss." In that event an arbitration did become a condition precedent to the maintenance of the action. The court quite properly held in that case

that the failure to arbitrate the amount of the disputed loss was a bar to the action. In the present case no such dispute was alleged or proved. The failure to arbitrate the amount of the loss was therefore not a bar to this action.

It neither appears from the evidence that the personal property was encumbered by a chattel mortgage at the time of the fire, nor that the policy is void on that account. The contract merely provides that: "This company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage." It does appear without conflict of evidence that the plaintiff John Jacobs sold and assigned his interest in the real and personal property to his brother Jonathan on September 27, 1929, in consideration of the sum of \$3,800, for which amount he gave his promissory note. On the same date the conveyance was approved by the insurance company and the policy was assigned to Jonathan. The only evidence that the personal property was ever covered by a chattel mortgage is the testimony of Jonathan Jacobs, as follows:

"Q. Did you give your brother a mortgage on anything? * * * A. I gave a mortgage for my brother, whatever they had. * * *

"Q. The furniture included? A. From 1925 to 1929, yes sir.

"Q. The mortgage on the furniture, you didn't put in writing did you? A. Mr. Cornell, that is my brother's fault, because when he took the deed with Mr. Wilcox, just he put in there so much mortgage, I didn't know he don't put (in) the furniture."

[5] From the foregoing evidence, it seems apparent that the personal property was not mortgaged. The witness evidently had the impression that the trust deed on the real property would also cover the personal property. But it did not cover the personal property. No chattel mortgage was ever executed, regardless of the intention of Jonathan in that regard. Assuming, without so deciding, that the personal property was mortgaged, the undisputed evidence is that it was only mortgaged "from 1925 to 1929." It follows that at the time of the fire on July 26, 1931, no chattel mortgage existed on the property. This is not a violation of the contract which provides merely that the company shall not be liable "while (the property) is encumbered by a chattel mortgage."

[6] It is not necessary for this court to determine whether a chattel mortgage which is not reduced to writing in the form provided

by section 2956 of the Civil Code is valid between the parties pursuant to section 2973 of the Civil Code. For the same reason it was harmless for the court to have instructed the jury that "a chattel mortgage is an instrument in writing," etc. It may, however, be suggested that section 2956 of the Civil Code does contemplate that a chattel mortgage shall be in writing in substantially the form therein prescribed. It may also be suggested that under the provisions of section 2973 of the Civil Code, relied upon by the defendant in this case, a chattel mortgage is "valid between the parties" to that instrument only when it does not conform to the provisions of the Code. In the present case the validity of an alleged verbal chattel mortgage is asserted by a stranger to that instrument.

[7, 8] We are of the opinion the subsequent insurance of two valuable Persian handmade rugs, one handmade linen bedspread, and certain table linen, on May 7, 1931, at San Francisco, by the Norwich Union Fire Insurance Society, was not a violation of the provisions of the defendant's policy which declares that it shall become void "if the insured now has or shall procure any other insurance whether valid or not, on property covered in whole or in part by this policy." It appears that in May, 1931, the plaintiff Jonathan Jacobs, who then lived and worked in San Francisco, procured two valuable Persian rugs, and certain other valuable handmade bedspreads in San Francisco. He immediately went to the agent of the Norwich Union Fire Insurance Society at San Francisco to insure them. It seems evident from the testimony of Jonathan that he attempted to insure them separately from the other household goods in the dwelling house at Turlock, although in reply to an inquiry from the agent, he said he was going to send them to his father and mother at Turlock to keep for him. The agent merely told him he would insure them as household goods. It is true that the policy of the Norwich Union Fire Insurance Society for the sum of \$3,000 did purport to cover generally "household furniture * * * (in dwelling house only) on the following described property, all only while situate (at) Route 4, Box 840, adjoining city limits of Turlock." It satisfactorily appears from the evidence that Jonathan did not intend to procure double insurance on any of the personal property. Indeed he testified that he sought only separate insurance on the subsequently purchased rugs and linen. It does not appear that he even knew the Norwich Union policy had been issued to also cover the household goods which were previous-

ly kept and insured in the Turlock dwelling house. No agent of the last-mentioned insurance company was called to testify that the insured sought to procure double insurance. It is a well-known principle that the construction of a contract depends on the intention of the parties thereto. All of the circumstances of the case indicate that Jonathan intended to separately insure only the valuable rugs and linen. He insured them immediately after acquiring them in San Francisco; he specified those particular items in his application for insurance; he never made a claim to the defendant insurance company for damages for the loss of those rugs and covers. His proof of loss which was submitted to the defendant company after the fire occurred specified each item of personal property and the value thereof, for the loss of which damages was claimed in the aggregate sum of \$1,616. The subsequently insured property was not included therein. No claim was ever made to the defendant company for loss on the rugs and linen. We are of the opinion the defendant's policy was not rendered void for a double insurance on the personal property under the circumstances of this case.

[9] It was harmless for the court to have admitted in evidence over the objection of the defendant, the proof of loss which was filed with the Norwich Union Fire Insurance Society for damages for the burning of the two Persian rugs, the bedspread, and linen therein itemized at a total value of \$3,750. It is claimed that this proof of loss which was filed with the last-mentioned company is self-serving and prejudicial. It proves no more than the necessary inference which must be drawn from the proof of loss already received in evidence which was filed with the defendant insurance company which omitted the rugs, bedspread, and linen. The only detrimental effect of the admission of the Norwich Union proof of loss is that plaintiffs were making no claim against the defendant for damages for loss of the last-mentioned property. That fact is fully established by the omission of those items from the proof of loss which was previously filed against the defendant and which had already been received in evidence. The admission of that document over the objection of the defendant was therefore not prejudicial.

[10] There is no merit in the contention of the defendant that the policy was rendered void for the alleged reason that the insured dwelling house was unoccupied at the time of the fire. The contract provides in that re-

gard: "The privilege for the within described dwelling to remain vacant or unoccupied is hereby increased to thirty (30) consecutive days." The undisputed evidence is that the father and mother of the plaintiffs lived on the premises and continuously occupied the dwelling house, except that for not more than ten days during the hot nights of July they temporarily slept in the tank house adjacent to the dwelling house. During all that time they lived in and about the dwelling house. To merely sleep in an adjoining tank house for comfort during certain hot nights under the circumstances of this case does not render the dwelling house vacant or unoccupied. 26 C. J., p. 213, § 259. The authority last cited declares in that regard: "Whether a dwelling house is occupied or vacant must depend upon the facts of each particular case; * * In general a dwelling house is occupied when human beings habitually live in it as a place of abode. When it ceases to be used for living purposes or as a customary place of human habitation it is unoccupied. It is not necessary that some person shall live in the house continuously, but it must be a usual place of abode, and there must not be a cessation of occupancy for any considerable length of time."

In the present case the policy specifically authorized a vacancy of the dwelling house for a period of thirty days. The policy was not violated in that regard.

[11-13] When the evidence shows a total loss of the property insured, and a compliance with all of the terms of the policy on the part of an insured person, except such as have been waived by the insurance company, interest is properly included on the amount of the obligation due under the terms of the policy, from the date when the loss is payable. The mere unwarranted denial of the validity of the contract on the part of the insurance company will not have the effect of defeating the right to recover interest otherwise recoverable under the provisions of section 3287 of the Civil Code. 26 C. J., p. 575, § 795; Rogers v. Manhattan Life Ins. Co. of N. Y., 138 Cal. 285, 71 P. 348. In the present case, assuming that there is no dispute regarding the amount of the loss which was sustained, the plaintiffs are entitled to interest on the amount ascertainable under the terms of the policy from the date of the filing of the proof of loss with the insurance company on the theory that it was conceded its obligation to pay three-fourths of the total amount of insurance by failing to dispute the proof of loss. This ob-

ligation is imposed in the event that the defendant fails to establish the invalidity of the insurance policy on account of any asserted breach thereof on the part of the plaintiffs.

For the reason that the judgment is excessive, it is hereby reversed and the cause is remanded for a new trial.

I concur: PULLEN, P. J.



5 Cal.App.2d 41

LEONARD v. HUME.
Civ. 9296.

District Court of Appeal, Second District,
Division 2, California.

March 1, 1935.

Rehearing Denied March 30, 1935.

1. Appeal and error ⇨930(1)

On defendant's appeal, where sufficiency of evidence is challenged, evidence must be viewed most favorably to plaintiff.

2. Automobiles ⇨244(12)

In action against driver of colliding automobile by guest in another automobile, evidence sustained verdict that defendant negligently drove his automobile against rear of other automobile which was proceeding in same direction.

3. Trial ⇨299

Bailiff held not guilty of undue influence invalidating verdict, where on Friday night preceding Christmas on Sunday he informed jurors that notice to hotel was essential if jury were to spend night there, and that jury would be given 15 minutes to determine whether there would be verdict.

4. New trial ⇨143(1)

Affidavits of jurors cannot be used to impeach their verdict.

5. Evidence ⇨192

Demonstration of physical injuries to jury is within sound discretion of trial court.

6. Appeal and error ⇨1032(1)

That trial judge consulted with plaintiff and her physician privately and denied without explanation defendant's motion that plaintiff be required to exhibit her injuries to jury held not error, where no prejudice was shown.

7. Appeal and error ☞900

On appeal, all presumptions are in favor of regularity of trial proceedings.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Anna L. Leonard against Alexander Hume. From a judgment for plaintiff, defendant appeals.

Affirmed.

Davis & Thorne, of Los Angeles, for appellant.

Henry Cohen and John R. Barta, both of Los Angeles, for respondent.

CRAIL, Justice.

This appeal is from a judgment in favor of plaintiff (respondent) in an action for personal injuries. The car in which plaintiff was riding had been parked in a parking station on the east side of Vine street between La Mirada and Lexington. The car was driven out of the driveway of said station and south on Vine street a distance of about 50 feet when it was struck by defendant's car, which was traveling south on Vine. The automobile in which plaintiff was riding did not belong to her, but was owned and driven by Monroe C. Kidder. It was stipulated by counsel that plaintiff was not guilty of contributory negligence.

[1, 2] Appellant first contends that his motion for nonsuit based upon the ground "that there was no evidence to support any allegation of negligence on the part of defendant" should have been granted. It is our duty on appeal to view the evidence in the light most favorable to the respondent. Having done so, we find there is substantial evidence to sustain the ruling of the trial court. The same observation and the same ruling is made as to appellant's contention that there is not sufficient evidence to support the verdict.

[3, 4] Appellant's third contention is that there was undue influence exercised upon the jury which caused them to bring in the verdict for the plaintiff, and that otherwise the result would have been a hung jury. The case was presented to the jury for consideration on Friday, December 23, 1932. Christ-

mas came on the following Sunday. Appellant presents the affidavits of three jurors stating that after several ballots had been taken the jury stood 8 to 4 against the defendant at about 9:45 p. m.; that "at that time the Bailiff in Department 11 who was assigned to take care of said jury, came into the jury room and stated that he had to give thirty minutes notice to the Rosslyn Hotel as to whether or not the jury would be sent there for the night, and he would give them fifteen minutes in which to make up their minds as to whether a verdict would or would not be rendered in this case"; that the jurors began talking about Christmas and wanted to be home for the holidays; and that they compromised on the verdict, the vote being 9 to 3 in favor of the plaintiff. If true, this did not constitute undue influence by the bailiff. As to the conduct of the jurors it is a well-known rule of law that the affidavits of jurors cannot be used to impeach their verdict. 24 Cal. Jur. 877.

[5-7] Appellant's fourth contention is that his "motion for a new trial should have been granted * * * because of irregularity on the part of the trial court in closeting himself with two of the witnesses during the trial in passing upon request made by defendant to permit the jury to see the back of the plaintiff, and then ruling adversely on defendant's request, without explanation as to his purpose in talking to said witnesses privately and without the presence of counsel." The demonstration of physical injuries to the jury is a matter within the sound discretion of the trial court. 10 Cal. Jur. 859. The question before the court was whether the plaintiff, a woman, should be stripped to the waist in order to display her injuries in open court. We are unable to see how any prejudice against defendant could have resulted from the mere fact that the court discussed the matter in chambers with the plaintiff and her physician. No prejudice is shown, and we must not assume error in order to grant a reversal. All the presumptions are in favor of the regularity of trial proceedings.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.

4 Cal.App.2d 612

TAYLOR v. JOYCE et al.
Civ. 9270.

District Court of Appeal, Second District,

Division 2, California.

Feb. 18, 1935.

Rehearing Denied March 20, 1935.

Hearing Denied by Supreme Court
April 18, 1935.**1. Automobiles** ⇨181(1)

Term "under influence of intoxicating liquor" is synonymous with "intoxication" as used in statute authorizing recovery by automobile guest for injuries resulting from driver's intoxication (St. 1931, p. 1693, § 141¼).

[Ed. Note.—For other definitions of "Intoxicated; Intoxication" and "Under the Influence of Liquor," see Words & Phrases.]

2. Appeal and error ⇨1064(2)

In automobile guest's action for injuries sustained in accident alleged to have resulted from chauffeur's intoxication, instruction defining word "intoxication" according to common usage, complained of as constituting instruction respecting matter of fact, held not prejudicial (St. 1931, p. 1693, § 141¼).

3. Automobiles ⇨193(15)

Automobile guest held entitled to recover from owner for injuries sustained in accident resulting from chauffeur's intoxication, though owner was not himself intoxicated (St. 1931, p. 1693, § 141¼).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Estelle Taylor against Frank Joyce and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Wm. M. Rains, of Los Angeles, and Ernest E. Noon, of Beverly Hills, for respondent.

CRAIL, Justice.

The defendants (appellants) appeal from a judgment in favor of the plaintiff recovered in an action for damages for personal injuries. The plaintiff is a motion picture actress. The defendant Joyce is engaged in the business of representing actors and writers in the motion picture business, and the defendant Scott was a chauffeur employed by the defendant Joyce for the purpose of driving Joyce's au-

tomobile. Miss Taylor was a guest of defendant Joyce on Christmas Eve at a cabaret party held at the Ambassador hotel in Los Angeles, which lasted until approximately 2 o'clock on the following morning, at which time the parties got into the automobile of defendant Joyce and were driven by the defendant Scott to a point a half mile from the hotel grounds, where he collided with a parked car. After hitting the parked car, Joyce's automobile went on and scraped a palm tree with its left side and came to a stop against the lawn in front of a house on Normandie avenue. As the plaintiff was the guest of the defendant Joyce, she was not entitled to recover damages against him for mere negligence, but she claimed and the evidence indicated that his chauffeur was decidedly drunk. Her entire basis of recovery against Joyce was founded on that portion of section 141¼, California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), which reads as follows: "Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication or wilful misconduct of such owner, driver or person responsible for the operation of such vehicle; provided, that in any action for death or for injury or damage to person or property by or on behalf of a guest * * the burden shall be upon plaintiff to establish that such intoxication or wilful misconduct was the proximate cause of such death or injury or damage."

[1] The appellants complain bitterly and at length with regard to certain instructions of the trial court to the jury in which the court used the terms "under the influence of intoxicating liquor" and "intoxication" as synonymous terms, their contention apparently being that if a person be intoxicated, he is dead drunk, at least decidedly drunk, whereas if a person be under the influence of intoxicating liquor, he may be only mildly intoxicated. They do not seem to realize that a person may be "intoxicated" in varying degrees, just as he may be "under the influence of intoxicating liquor" in varying degrees. The appellants are foreclosed in this regard by the recent case of Tracy v. Brecht (Cal. App.) 39 P.(2d) 498, 502, which approves the language of People v. Dingle, 56 Cal. App. 445, 205 P. 705, as follows: "It is probably true, however, that the phrase 'under the influence of intoxicating liquor' is, substantially and to all practical intents and purposes, synony-

mous with such words as 'Intoxication' and 'drunkenness.' In Webster's New International Dictionary (1930 Ed.) the following appears: "Intoxicated. Affected by an intoxicant; under the influence of an intoxicating liquor. * * *

[2] Appellants' next contention is that the trial court erred in giving an instruction defining the word "intoxication" and particularly he contends that to do so was instructing the jury with respect to a matter of fact, whereas the court had no right to instruct as to any matter of fact. The definition as given was based apparently upon an excerpt taken bodily from the decision in the case of *People v. Ekstromer*, 71 Cal. App. 239, 235 P. 69, which was approved in *People v. Dingle*, supra. The definition, however, is merely a statement of the meaning given to the word in common usage. "We cannot believe that any prejudicial error resulted from permitting the jury to accept the common understanding of the words." *People v. McKee*, 80 Cal. App. 200, 251 P. 675, 677. This contention of the appellants with regard to the use of the words "intoxicated" and "under the influence of intoxicating liquor" runs through a great part of appellants' brief, both as to instructions given and instructions refused.

Appellants also contend that errors were committed by the trial court in the rulings on the introduction of evidence. We have examined these points and find no error which would entitle the appellants to a reversal. Appellants also contend that the evidence is insufficient as a matter of law to support the verdict of the jury and also that the verdict is excessive as a matter of law, but we find against the appellants on both these propositions.

[3] The plaintiff did not claim that the defendant Joyce was intoxicated, and the appellants' final contention in the opening brief is that under the law a guest is not permitted to recover against the owner or person responsible for the operation of a vehicle unless such owner or such person is personally intoxicated or is personally guilty of willful misconduct. We do not believe the statute should be given this narrow construction and find against the appellants in this regard.

In the appellants' reply brief they set forth eight different points which they contend were contained in the opening brief and upon which they rely and which they claim the respondent has failed to answer or attempt to answer. We are mindful of all these contentions of the appellants, but in this age which

demand brevity as a cardinal virtue second only to clearness, we feel that they are not of sufficient general importance as to require detailed discussion, and we are satisfied that no error was committed by the trial court which would entitle the appellants to a reversal. There is some room for criticism of instructions V and VII, but all of the instructions being considered as a whole correctly define the law about as clearly as is reasonably possible.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



5 Cal.App.2d 91

CONARD v. CONARD.

Civ. 1566.

District Court of Appeal, Fourth District,
California.

March 4, 1935.

1. Husband and wife ⇨259

Husband *held* entitled to apply his earnings for support of his family and keep his separate estate intact (Civ. Code, §§ 162, 163, 164).

2. Divorce ⇨249(1)

Court's power to assign property upon dissolution of marriage is limited to community property and homestead (Civ. Code, § 146).

3. Husband and wife ⇨14(3)

Interest of spouses in property held in joint tenancy must be classed as their separate but joint estates (Civ. Code, §§ 162, 163, 164).

4. Divorce ⇨249(3)

In divorce action setting aside to wife building and loan association accounts on ground that they were community property *held* error, where record did not disclose that agreement creating joint account was executed or that wife's signature was filed with association, or that passbook was *delivered* to wife (Civ. Code, §§ 146, 162, 163, 164).

5. Husband and wife ⇨266

Husband should not be held to have intended to part with title to building and loan association accounts by ambiguous phrase

which is consistent with contrary purpose (Civ. Code, §§ 146, 162, 163, 164).

6. Appeal and error §1011(1)

Trial court's finding upon conflicting evidence that husband's decree of divorce granted by Nevada district court upon substituted service of summons was secured upon simulated residence in Nevada could not be disturbed.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by Amy E. Conard against Burton L. Conard. From a judgment, defendant appeals.

Affirmed in part, and reversed in part, and remanded.

Claude L. Rowe, of Fresno, and Fairfax Cosby and Benjamin Lewis, both of Los Angeles, for appellant.

Edmund F. Barker and Wm. Moseley Jones, both of Los Angeles, for respondent.

ALLYN, Justice pro tem.

Appeal from a judgment granting to plaintiff wife a decree of divorce and setting aside to her certain property found by the trial court to be community property. Three grounds of reversal are urged: First, that the finding that the property was community is not supported by the evidence; second, that it was an abuse of discretion to set aside to the wife all of the property found to be community; and, third, that it was error to disregard a prior decree of divorce granted by a district court of the state of Nevada upon substituted service of summons.

At the time of their marriage each party had some property. The defendant, in addition to certain equities in real estate not involved in this action, owned two building and loan association accounts. After the marriage he caused new passbooks to be issued in the joint names of himself and wife. These accounts are referred to in the record as "joint accounts," although it does not appear that any such deposit agreement was signed or that plaintiff's signature was filed with either of the associations. At any rate, defendant retained possession of the passbooks until they were taken surreptitiously by the plaintiff. The real property was purchased after marriage from funds of the separate estate of each spouse, and was conveyed to them as joint tenants.

[1] The defendant was employed during most of the time that elapsed from the date of marriage to the date of separation, but there is no evidence that his earnings did more than support the family. He was entitled to so apply his earnings and keep his separate estate intact. In re Estate of Cudworth, 133 Cal. 462, 65 P. 1041; Seligman v. Seligman, 85 Cal. App. 683, 259 P. 984. Further, there is no evidence of any contribution by the wife to the community, so there is no question involved of the commingling of separate and community funds.

[2, 3] All property of a spouse owned before marriage and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is the separate property of such spouse. All other property acquired after marriage is community. Civ. Code, §§ 162, 163, and 164. The power of a court to assign property upon dissolution of marriage is limited to the community property and the homestead. Civ. Code, § 146; Allen v. Allen, 159 Cal. 197, 113 P. 160; Heintz v. Heintz, 126 Cal. App. 106, 14 P.(2d) 317. The interest of the spouses in property held in joint tenancy must be classed as their separate but joint estates. Siberell v. Siberell, 214 Cal. 767, 7 P.(2d) 1003.

[4, 5] The findings of the trial court that these items of property belonged to the community finds no support in the record, and that part of the judgment assigning them to the plaintiff must be reversed. The argument of respondent that appellant made a gift of the building and loan association accounts, and hence that they lost their character of separate property by his voluntary act, cannot be sustained. The record does not disclose that any agreement creating a joint account was executed or that plaintiff's signature was filed with either of the associations, and there is no evidence of delivery of the passbooks to her. Possession by her of these passbooks was not the equivalent of delivery. The theory of gift in this case is inconsistent with the retention by the appellant of possession of the passbooks and of the right to himself withdraw the whole of these accounts. On the other hand, the form in which the deposits were made is entirely consistent with the desire on his part to give his wife authority to draw money from time to time or, as stated by him, "in case I passed on, she was to have the money and not otherwise." It should not be held that he intended to part with his title

thereto by an ambiguous phrase which is quite consistent with a contrary purpose. *Denigan v. Hibernia Savings & Loan Society*, 127 Cal. 137, 59 P. 389; *In re Estate of Nelson*, 104 Cal. App. 613, 286 P. 439; 3 Cal. Law Review, 418. Appellant's action was entirely consistent with the retention of these accounts as his separate property.

The foregoing conclusion disposes of the second ground of appeal, to wit, that it was error to assign all of the property found to be community to the respondent.

[6] The finding of the trial court that appellant's decree of divorce granted by the Nevada district court was secured upon simulated residence in that state, the decree being based upon a substituted service of summons, is in direct agreement with the authorities (*Delanoy v. Delanoy*, 216 Cal. 23, 13 P.(2d) 513), and, being based upon conflicting evidence, cannot be disturbed on appeal.

That part of the judgment setting aside the real property and the building and loan association accounts to respondent as community property is reversed and the cause remanded for such proceedings as are not inconsistent with this opinion. The judgment is otherwise affirmed.

We concur: BARNARD, P. J.; MARKS, J.



4 Cal.App.2d 761

In re LEPORI'S ESTATE.

LEPORI v. SHERMAN et al.

Civ. 9734.

District Court of Appeal, First District,
Division 2, California.

Feb. 25, 1935.

Rehearing Denied March 27, 1935.

Hearing Denied by Supreme Court
April 25, 1935.

1. Wills ⇨163(2)

Burden is cast on proponents to overcome presumption arising when one who unduly profits by will and who sustains confidential relationship to testator actively participates in procuring execution of will.

2. Wills ⇨166(2)

Disinterested witnesses' evidence tending to show that beneficiaries did not actively

participate in execution of will supported finding that undue influence was not used by beneficiaries sustaining confidential relationship with testator.

3. Wills ⇨55(1)

Evidence supported finding that when will was executed testator had sufficient knowledge of testamentary act to be competent.

4. Wills ⇨31

Whether at time will was executed testator's mind was clear to such degree that he had sufficient knowledge of testamentary act is criterion of testator's competency.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Proceeding by Carla Cecilia Lepori, a minor, by and through Hugh H. Donovan, as guardian of her person and estate, contesting the will of Constantine Lepori, also known as C. Lepori and Constantino Lepori, deceased, opposed by Mary Sherman and another, as executors of the estate of Constantine Lepori, deceased and others. From an adverse judgment, contestant appeals.

Affirmed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Wade W. Moore, of Pittsburg, and Thomas M. Carlson and Robert Collins, both of Richmond, for appellant.

Eugene K. Sturgis, of Oakland, and Tinning & DeLap, of Martinez, for respondents.

NOURSE, Presiding Justice.

A contest before probate of the last will of Constantine Lepori was heard by the court sitting without a jury. The contestant is a granddaughter of the deceased, a minor of five years of age, and the only surviving lineal heir. The proponents are nephews and nieces of the deceased. The grounds of the contest were the alleged undue influence of these relatives, particularly Mary Sherman, and the alleged incompetency of the deceased. The trial court found against contestant on both issues, and the only question raised on this appeal is the sufficiency of the evidence to support these findings.

The testator was about seventy-five years of age at the time the will was executed. He had been actively engaged in business in Pittsburg, Contra Costa county, and had accumulated a fortune estimated above \$500,000 in 1929. He died on January 31, 1932, and the appraised value of his estate at that

time was \$143,000 with an indebtedness of about \$60,000. A large part of the estate was in shares of the Transamerica Corporation, which was of fluctuating value during this period. In September, 1929, when the deceased estimated his estate at a high value because of the almost fabulous value placed on this stock, he executed a will in which he made a number of large specific bequests and left the residue in trust to pay certain annuities and to pay for the support and education of the contestant, the corpus to go to her when she reached the age of forty. In this will the testator made ample provision for the mother of contestant, the daughter-in-law of the testator, so that she could maintain herself comfortably during contestant's minority and properly care for her education and training.

After the execution of this will, the testator became very ill and was under medical care with the aid of a special male nurse and of his daughter-in-law until August, 1931, when he went to live with his niece, Mary Sherman, at her home in Napa county. From this time until his death, Mary Sherman took complete charge of the deceased. She discharged his male nurse and employed her mother-in-law in his place. She wrote his letters and assumed complete control of his business affairs, dictating the sale of properties, the collection of accounts, and the extension and settlement of loans and mortgages. Testator's business was handled through an employee of a bank in Pittsburg, who held a general power of attorney from the deceased. During all this time the deceased was becoming continually weaker mentally and physically so that Mary Sherman, on numerous occasions, wrote to this agent that the deceased was not in condition to discuss matters of business, which, for that reason, these two assumed to settle for themselves. In December, 1931, Mary Sherman wrote to this agent stating that her uncle wished to execute a new will and inclosing memoranda for that purpose. The agent, an employee of the American Trust Company branch at Pittsburg, forwarded the memoranda to the head office with a request that a will be prepared eliminating the granddaughter as residuary legatee and substituting Mary Sherman, her sisters, and her brother as such. A will was prepared in accord with this memoranda and executed on January 18, 1932, thirteen days before testator's death. This is the will under contest.

[1] On the issue of undue influence the appellant relies upon the presumption arising when one who unduly profits by a will and

who sustains a confidential relationship to the testator actively participates in procuring its execution. In re Estate of Lances, 216 Cal. 397, 403, 14 P.(2d) 768. When this presumption arises, the burden of proof is cast on the proponents to overcome the presumption. The respondents proclaim that they have met this burden as to each of the three items upon which the presumption rests, but assert that if they have been successful as to one item, the presumption falls because the rule is that all three must be present, citing In re Estate of Baird, 176 Cal. 381, 384, 168 P. 561. It is manifest from the record that, during the last two years of his life, the testator was in a very weak mental and physical condition and that relatives took advantage of this condition to gain profit for themselves. When he was confined in a sanatorium in San Diego, he was visited by his daughter-in-law. During that time he executed a codicil to his will revoking all allowances made therein except those to his daughter-in-law and granddaughter. On August 22, 1931, seven days after Mary Sherman took him under her care, he executed a revocation of this codicil written in the hand of Mary Sherman. The will of 1929 left the bulk of the residue in trust for the granddaughter and made minor bequests to Mary Sherman and to her brother and two sisters. The will of 1932 left this residue to these four and thus gave to them all the liquid assets of the estate cutting down the granddaughter to a piece of real property in Fruitvale of doubtful value with an estimated income of \$50 a month without allowance for taxes, insurance, or upkeep.

[2] On the issue of undue influence the evidence is confined to the activities of Mary Sherman and, in a small degree, of Augusto Lepori, her brother. We need not review the evidence for both sides because the question on appeal is simply: Is there substantial evidence to support the finding of the trial court that undue influence was not used? We may agree with the statement of the trial judge made in open court that the testimony of Mary Sherman and her brother was colored and not frank in regard to either the physical or mental condition of the testator. The same may be said of some of the other testimony offered by respondents. But evidence was received from disinterested witnesses tending to show that the proponents did not "actively participate in the execution of the will," and this is sufficient to dispel the presumption relied on. Since the trial court believed this evidence, its finding that undue influence was not used properly followed.

[3, 4] Upon the ground of mental incompetence, three physicians who had active care of the testator until a few months before he was taken to the Sherman home testified that he was suffering from arteriosclerosis, edema of the brain, and senile dementia, all of which they testified were progressive and incurable. This evidence was not controverted by respondents. It was supplemented by the testimony of intimate acquaintances who expressed the opinion that the testator was incompetent because of peculiarities noted at different times during the period following his acute illness in the spring of 1931.

To controvert this evidence, the respondents tendered the testimony of the physician who treated the testator during his last illness and of business associates, all of whom expressed the opinion that the testator was competent at the times they observed him. It would serve no purpose to recite this evidence in detail. It is sufficient to say that the evidence as a whole tended to show that the testator was weak in mind and body for a long time prior to his death and that he was frequently susceptible to the suggestion and influence of those about him; but that throughout all this period he had lucid intervals during which his mind functioned normally. The testimony offered by respondents was sufficient to show that, at the time the will was executed, the testator's mind was clear to that degree which would support the finding that he had sufficient knowledge of the testamentary act. This is the criterion upon which the question of competency is to be determined. In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



**WORK et al. v. COUNTY NAT. BANK &
TRUST CO. ***
Civ. 8449.

District Court of Appeal, Second District,
Division 1, California.
Feb. 28, 1935.

Hearing Granted by Supreme Court
April 29, 1935.

1. Limitation of actions ⇨127(2)

Amended complaint *held* not barred by limitations, though filed after lapse of statu-

tory period, where amended complaint was based on same facts stated in original complaint and amendments attached to amended complaint at trial were merely conclusions of law based on facts as set out in complaint and amended complaint.

2. Trusts ⇨289

Trustee taking over title to land on certain trust, which required it to account to owner for value as fixed in option to purchase, and then disposing of trust property in violation of trust under circumstances which left owners short of amount they were to receive, *held* required to account for such amount.

3. Accord and satisfaction ⇨10(1)

Compromise and settlement ⇨5(1)

Accord and satisfaction of claim could not be obtained by trustee paying less than amount claimed upon disputed demand, when it failed to disclose in its statement, which it claimed was in full, facts upon which plea of accord and satisfaction must have rested.

4. Judgment ⇨255

In order to obtain inclusion in judgment of provision that settlement or payment obtained in another case would satisfy judgment in present case, or that payment of judgment in present case would satisfy judgment of the other case, it was necessary to introduce into evidence judgment roll in such other case.

5. Appeal and error ⇨1071(1)

Inclusion in findings of certain conclusions of law did not constitute reversible error.



Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Action by John Work and another against County National Bank & Trust Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Griffith & Thornburgh and William G. Griffith, all of Santa Barbara, and Flint & MacKay and William A. Bowen, all of Los Angeles, for appellant.

C. F. Lacey, of Salinas, for respondents.

YORK, Justice.

The findings in this case are amply sufficient to support the judgment. The complaint is sufficient to justify the findings, and the evidence, in spite of some conflicts, is sufficient to support each and all of the

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 51 P.2d 90.

findings. Certain parts of the evidence, as set forth in appellant's opening brief, would justify findings contrary in several particulars to those found by the trial court, but an examination of the evidence discloses the fact that each of the findings particularly complained of was supported by evidence both oral and documentary.

The first part of appellant's opening brief sets forth the following statement of the questions involved in this appeal:

"1. Where a complaint is for money received by defendant trustee to the use of plaintiff and an amended complaint is filed after the lapse of the statutory period of limitation, setting up an alleged cause of action in damages for breach by the defendant trustee of a trust agreement in transferring certain trust property to plaintiff's vendee before the agreed contingency to such transfer, consisting in the payment to plaintiff vendor of certain money, is such amended complaint barred by the Statute of Limitations?

"2. Where such trust agreement provides for reconveyance by trustee to vendor of such property in default of such payment, is damage for such breach by the trustee the amount due vendor from vendee?

"3. If, under the evidence, the trustee has exercised good faith and reasonable care and judgment in determining the existence of the aforesaid contingency, is the trustee liable?

"4. Is payment of less than amount claimed upon disputed demand when accompanied by statement that it is in full and when received and appropriated, a satisfaction of claim?

"5. Is judgment against vendee for unpaid balance of purchase price admissible as prima facie proof of amount of damages in suit by vendor against trustee for breach of trust agreement?

"6. Is testimony admissible against such defendant trustee of parol options on land as proof of ownership by plaintiffs affecting description and acreage of trust property?"

[1] As to question 1, the amended complaint is based upon the same facts stated in the original complaint. The effect of the amended complaint, as amended at time of trial, was not as stated in said question. The amendments attached to the amended complaint at the time of trial were, in effect, nothing more than conclusions of law based

on the facts as set out in the complaint and the amended complaint. The amended complaint to which such amendments were attached was merely a more detailed and definite statement of the facts set out in the original complaint, to wit: A statement of account for moneys due to plaintiffs by reason of the default of the defendant in not paying to the plaintiffs, as beneficiaries of the trust assumed by defendant, the amount due to plaintiffs by reason of a failure of the defendant to carry out its trust as expressed in the trust agreement. Therefore, the trial court was right in finding that the statute of limitations was not a bar to the second count of the amended complaint.

[2] As to question No. 2, the breach by the trustee of the conditions of the trust, and the facts and circumstances constituting such breach, as found by the trial court, would be sufficient to justify the finding as to such breach and the judgment in the amount found by the court. As stated by respondent: " * * * this is simply a case of a trustee taking over the title to a large tract of land upon certain trusts, which required it to account to the owners for its value as fixed in an option to purchase, and then disposing of the trust property in violation of its trust, and under circumstances which left the owners short of the amount of money they were to receive." For this amount the trustee must account, and the trial court so found.

As to the third question, it is not involved here, as there were in evidence before the trial court no such facts as stated therein.

[3] As to the fourth question, an accord and satisfaction of the claim could not be obtained by a trustee when it failed to disclose in its statement—which it claimed was in full—the facts upon which the plea of accord and satisfaction must have rested. The statement of account, so called, did not show the details as to the conveyance by the trustee of property that was to be held in trust by it, and not to be conveyed until the last of the property was conveyed to it, and at the time of the payments and statements of account relied on to state an account, it was known to all the parties that the actual acreage was not then exactly settled or determined. Regardless of these questions raised, the money that was paid to plaintiffs was the property of the plaintiffs and they were entitled to the payment in full of the amount paid, without being subjected thereby to the rule of accord and satisfaction.

Some of the points raised by appellant are answered by the reasons given for the decision in the case of *Work v. Associated Almond Growers of Paso Robles*, 102 Cal. App. 232, 282 P. 965.

[4] In order to obtain the inclusion in the judgment of a provision that the settlement or payment obtained in the case of *Work v. Associated Almond Growers*, supra, should satisfy the judgment herein, or that the payment of the judgment herein would satisfy the judgment of the cited case, it was necessary to introduce into evidence the judgment roll in the cited case.

[5] The objections of the appellant to the sufficiency of the evidence to support certain findings are supported by appellant in each instance by a statement of *only* part of the evidence and by the omission of evidence which was sufficient to support the findings objected to. That is especially so in the concluding portion of appellant's brief in which it is claimed that there was no evidence to support finding No. VII as to some of the acreage which appellant claims was not known to any of the parties at the time of the execution of the trust agreement. It was acreage which was taken possession of by the Associated Almond Growers. Buildings were torn down on a portion of it by the Associated Almond Growers, improvements were made, or at least changes were made in the character of the planting of the land, and it was treated at all times by the Associated Almond Growers as being included in the land held in this trust. As to finding No. VIII, the objection made in the following form: "That the defendant has fully executed and performed its trust and that Finding VIII to the contrary is not supported by the evidence," is without merit. There is ample evidence to support the whole of said finding, in that the said trust company did not carry out its trust in the various particulars, as found by the trial court. The inclusion in certain findings of certain conclusions of law does not constitute reversible error. There is sufficient evidence to justify the finding of damage generally objected to which is known as finding No. IX.

Nothing in the record is called to our attention by appellant that would justify a reversal of the judgment.

The judgment is affirmed.

HOUSER, Justice.

I concur in the judgment.

CONREY, Presiding Justice.

I concur. It must be admitted that the second count of the amended complaint is different from the first complaint in some details of statement of the alleged transactions. Yet the nature of the cause of action, the foundational facts of the trust, and the failure of the trustee to perform the duties assumed by it as such trustee, are of the substance equally of both counts. The cause is of equitable jurisdiction, although the remedy happens to assume the form of a money judgment. To uphold the defendant's plea of the statute of limitations, it would be necessary to treat the second count of the amended complaint as setting up a new and separate cause of action at law, without regard to the equitable rights involved and which at all stages of the action were an essential part thereof. But the pleadings do not justify such interpretation.



5 Cal.App.2d 71

SWITZER et al. v. YUNT et al.

Civ. 1378.

District Court of Appeal, Fourth District,
California.

March 1, 1935.

Rehearing Denied March 28, 1935.

1. Waters and water courses ☞119(1)

Upper landowner whose land consisted of "hog wallow land" had right to level land to make it fit for cultivation and to deposit surplus dirt in bottom of duck pond thus rendering it fit for cultivation, notwithstanding water was thereby passed upon land of lower owners, where work did not change general natural slope and drainage of locality.

2. Waters and water courses ☞119(2)

Upper landowner whose land consisted of "hog wallow land" and who leveled land to make it fit for cultivation did not have right to increase drainage from his land by digging ditches to convey water toward land of lower landowners.

3. Waters and water courses ☞118

Where defendants possessed higher property with natural drainage toward plaintiff's property, plaintiffs held without right to build

a dam to withhold certain waters flowing defendants' property, and draining across plaintiffs' property.

4. Waters and water courses ☞125

Upper proprietors, who hastened and increased flow of water across lower owners' land by digging ditches which contributed to injury suffered by lower owners by increasing discharge of water through drain, were liable for damage thereby caused.

5. Damages ☞6

Where parties contribute to damage which has been caused by their acts and acts of another, they cannot escape liability because their proportionate contribution is not accurately measured.

6. Waters and water courses ☞124

In controversy between adjoining owners over drainage of surface waters, judgment which restrains upper landowners from increasing natural flow of surface waters from their property by unlawful artificial means upon lower owners' property, and which did not interfere with lawful grading and leveling of upper owners' property, and which left unchanged general natural slope of that part of the country, held not error.

7. Appeal and error ☞1071(1)

Findings which were not carried into judgment could be treated as surplusage and disregarded.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by T. Wayne Switzer and another against William O. Yunt and another, wherein defendants filed a cross-complaint. From an adverse judgment, defendants appeal.

Affirmed.

J. A. Chase, of Visalia, for appellants.

Bradley & Bradley, of Visalia, for respondents.

MARKS, Justice.

Plaintiffs and defendants are owners of tracts of land in Tulare county on opposite sides of a county road which runs north and south. Defendants own eighty acres which extend one-half mile along the east side of the road, and plaintiffs own twenty acres which extend one-eighth of a mile along its west side. The south boundaries of the two tracts form a straight line. The county road is

graded above the level of the adjoining lands for the entire distance of one-half mile, except in two places; one being just south of the north line of plaintiffs' property, and the other in a place that does not concern us. At the point we have mentioned, for about eighty feet, the road is a few inches below the grade of defendants' property, but it is several inches above the grade of plaintiffs' property. The road had gutters on both its sides below the surface grades of both properties. Thus the road formed an effective dam against the free flow of surface waters from east to west, except at the two points mentioned.

All of the land in the neighborhood of the tracts in question was what is designated by a department of the federal government as "hog wallow land" which had to be leveled before it could be successfully farmed. The evidence shows that in its natural state defendants' land had upon it a depression of not more than one and one-half acres in area and of not more than two feet in depth. It was referred to by many witnesses as a "duck pond," and was situated near the west boundary and about half way between the north and south boundary lines of defendants' property. There were two other smaller depressions on defendants' land and one on plaintiffs'. These depressions held surface water during the rainy season, and several witnesses for plaintiffs testified that over a period of a number of years they had never seen water draining from the duck pond. It would seem that the purpose of this evidence was to lay the foundation for the conclusion that when the land was in its natural state the duck pond furnished a reservoir for all surface waters and prevented their draining away.

Plaintiffs graded and planted their land to grapevines about the year 1921. Shortly thereafter the defendants graded and planted the north forty acres of their property, and later graded and planted the south forty acres. In these operations the hog wallows were leveled and the bottom of the duck pond was raised, though just how much is not apparent. It continued to be the low point on defendants' property.

It is not questioned that in its original state, as well as after the grading operations were completed, the general slope of the country was from northeast to southwest. The north twenty acres of defendants' property was irrigated from north to south, the next thirty acres from east to west, the next ten

acres from south to north, and the south twenty acres from north to south. All lands adjoining the road on the west side of defendants' property, including plaintiffs' property, was irrigated from east to west.

The southwesterly slope of the country was gentle. There is in the record a profile map of the county road and the property immediately adjoining its sides. The profile line of the center of the road does not show a change of grade of more than three feet six inches and those of the properties immediately adjoining it a change of grade of not more than three feet two inches in the one-half mile depicted. Mr. Switzer was of the opinion that the westerly fall across his property and the twenty-acre tract adjoining it on the west was not more than five feet.

In 1930 or 1931 the use of defendants' south forty acres was changed from growing alfalfa to growing citrus trees. The alfalfa land had been blocked into squares by ridges which held drainage waters upon the ground. This blocking was abandoned when the citrus trees were planted. During the rainy season of 1931-32 some trouble was experienced by defendants because of the backing up of rain water against the road which flooded portions of their orchard. By arrangement with the owner this water was drained under the road and into a drainage pit on the property adjoining plaintiffs' property on the north. During the rainy season of 1932-33 defendants threatened to sue the county of Tulare for damages to their land and trees if drainage were not provided under the county road. Plaintiffs threatened to sue the county if such drainage were provided in front of or near the front of their property.

On January 28, 1933, the county of Tulare installed an eight-inch drain pipe under the road at a point a short distance north of the northeast corner of plaintiffs' property. Some time during that afternoon Mr. Switzer and his neighbor to the north built a dirt dam along the east side of their properties with its center about opposite the drain pipe. A hard rain started that same afternoon and lasted through the night and into the next day. During the night the dam broke near the northeast corner of plaintiffs' property. The water washed top soil and fertilizer that had just been spread off the property. Mr. Switzer and another witness testified that before the storm they saw an employee of defendants digging ditches along the east side of the road and on the west side of defendants' property. After the storm dug ditches were found, one leading from the duck pond on defendants'

property and emptying into the gutter of the road near the east end of the drain pipe, a second dug ditch in the east gutter of the road draining water from north to south, and a third dug ditch in the east gutter draining water from south to north in the direction of the drain pipe.

Neither party contends that the rain commencing on January 28 was a great and unusual storm, or that the water that collected on defendants' property was flood water or anything more than surface drainage water precipitated by the storm.

Plaintiffs instituted this action and prayed that they recover their damages caused by the erosion of their land, and that defendants "be perpetually enjoined and restrained from allowing any surface or rain water or any water from their said land to empty upon, flood or run over the land of plaintiffs, and that said defendants be restrained from running any surface or rain water or any other water from their land onto the land of plaintiffs." Defendants filed a cross-complaint whereby they sought to enjoin plaintiffs from obstructing the natural flow of surface water across their land.

It was evidently the theory of the plaintiffs at the trial, and is again asserted here, that the duck pond on defendants' property, before it had been leveled, furnished a natural reservoir which restrained all surface and storm waters falling or draining upon defendants' land; that defendants partially filled it when they leveled their property; that they should not have been permitted to fill in low places or change the natural contour of the ground; that having done so, by leveling their land, they were responsible for the damages suffered by plaintiffs. This theory was adopted by the trial court in its findings.

The judgment is drawn upon another theory. It gave plaintiffs damages in the sum of \$200. It provided that defendants be "perpetually enjoined and restrained from causing by artificial means any surface water to flow from their land onto the land of plaintiffs T. Wayne Switzer and Winifred Switzer, as above described." It also provided that plaintiffs be "perpetually enjoined and restrained from maintaining any dam or bank which will cause any surface water that naturally flows or may naturally flow from defendants' land, as it now exists, over the County road, which lies between the land of plaintiffs and defendants, against said dam or bank so as to cause said surface water to be turned back or held on defendants' land."

We must first consider the right of an owner of property to level his land so that it may be made fit for cultivation. In so doing it must be borne in mind that the duck pond was not a permanent lake or pond. It was originally a low place into which surface waters drained during the rainy season. It was dry the greater portion of each year.

The great valleys of central and southern California are by nature arid; in some parts they are desert lands. Neither the arid nor the desert lands can be devoted to agricultural, horticultural, viticultural, or citricultural purposes without irrigation. Hog wallow land is not uncommon in these areas. While the San Joaquin Valley is, generally speaking, level, the surface of the ground is gently undulating. Large tracts here and in Southern California cannot be successfully irrigated without first leveling the ground. This is particularly true of the hog wallow lands. If it be the law in California that an owner of land cannot level it the result "would be to condemn to sterility vast acreages of agricultural lands situate in the state." *Coombs v. Reynolds*, 43 Cal. App. 656, 185 P. 877, 879.

We find the following note in 11 Ann. Cas. 1144: "Even courts which deny the right of the owner of higher land to discharge upon the lower land, by artificial drains or ditches, water collected in ponds or sag holes, hold that the owner may, for the purpose of cultivating his land, fill up sag holes, though the water collected therein may thereby find its way to the lower land. *Launstein v. Launstein*, 150 Mich. 524, 114 N. W. 383 [121 Am. St. Rep. 635]. Compare *Pickerill v. Louisville*, 100 S. W. 873, 30 Ky. Law Rep. 1239. The right of the owner to change the surface of his land was also involved in *Applegate v. Franklin*, 109 Mo. App. 293, 84 S. W. 347, wherein it appeared that the defendant drained a large pond or lake which covered part of his as well as the plaintiff's land, thereby destroying the plaintiff's fishing business. It was held that an owner has the right to drain his land for any desirable purpose, provided the drainage is performed in a reasonably careful manner. See, also, *Mehonray v. Foster* (1908) [132 Mo. App. 229] 111 S. W. 882." See *Bennett v. Cupina*, 253 N. Y. 436, 171 N. E. 698; *Harbison v. City of Hillsboro*, 103 Or. 257, 267, 204 P. 613.

The case of *Jennings v. Bohner* (Sup.) 134 N. Y. S. 943, is factually identical with the instant case. The court there held that the owner of the higher land had the right to fill by grading a low place on his property which

formed a pond so that it could be cultivated, but did not have the right to concentrate the water in a ditch and precipitate it onto the lower land of his neighbor through the ditch and culvert under the road which separated the properties.

The case of *Coombs v. Reynolds*, *supra*, presented a somewhat similar question to the one we are considering. There it was contended that the farming operations on the dominant tenement caused an increased flow of surface water onto the servient tenement and consequent damage to it. It was the opinion of the court that an owner of property had the right to cultivate it and make use of it for the purposes for which it was best suited, and that if the natural general flow of surface water was not changed such owner would only be liable for injuries resulting from such cultivation, in the event it was performed in a negligent or willful manner. The court there said: "The courts of this state are committed to the rule of the civil law respecting the law of surface or storm waters. *McDaniel v. Cummings*, 83 Cal. 515, 23 P. 795, 8 L. R. A. 575; *Los Angeles C. Ass'n v. Los Angeles*, 103 Cal. 461, 37 P. 375; *Wood v. Moulton*, 146 Cal. 317, 80 P. 92. While the civil law protected a lower proprietor against an upper owner from the injuries resulting from sending surface waters down to the lower owner in a manner different from their natural flow, yet 'there was, however, one act of man excepted * * * and that was the tilling of the fields in the natural way.' *Kinney on Irr. and Water Rights* (2d Ed.) § 560; *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120, and case note."

[1] In the instant case we have concluded that the defendants had the right to level their land in order to make it fit for cultivation and in so doing had also the right to deposit surplus dirt in the bottom of the duck pond thus rendering it, too, fit for cultivation. This work did not change the general natural slope and drainage of the locality. It was still from northeast to southwest. In its natural state if the duck pond overflowed, the water would take a general southwesterly course and find its way onto part of plaintiffs' property. It is true that a number of witnesses for plaintiffs testified that they had never seen it overflow. This did not establish the fact that it would not if sufficient water drained into it. These same witnesses testified that they had never seen it cover an area of more than one and one-half acres. There is undisputed evidence before us that

during the storm in question the pond on defendants' property covered an area of at least five acres. It is self-evident that had the pond been in its original state it would not have restrained the waters of this storm. They would have followed the fall of the land to the southwest.

[2] We are also of the opinion that defendants did not have the right to increase the drainage from their land by digging ditches to convey the water toward plaintiffs' land. This conclusion is supported by the great majority of cases in those states following the civil law rules concerning the flow of surface waters. *Wood v. Moulton*, 146 Cal. 317, 80 P. 92; *Galbreath v. Hopkins*, 159 Cal. 297, 113 P. 174.

[3] It is clear that plaintiffs did not have the right to build a dam to withhold surface waters from draining across their property. The defendants possessed the higher property with the natural drainage to the southwest. This property, the dominant tenement, possessed an easement over plaintiffs' lower property, the servient tenement, which prevented plaintiffs from interfering with the free drainage of surface waters in the direction provided by nature. *LeBrun v. Richards*, 210 Cal. 308, 291 P. 825, 72 A. L. R. 336.

[4, 5] It is probable that part of the damage suffered by plaintiffs was attributable to the acts of the county of Tulare. Its road was graded to an elevation above that of the adjacent land except at two points. The road formed a dam that effectively checked the natural flow of the surface water to the southwest. There was but one drain under the road in the half mile of its length we have in question here. This had the effect of concentrating and discharging the restrained surface water at one point near the corner of plaintiffs' property. The washing of the land below the one point of discharge would be a natural result of this condition. However, defendants hastened and increased the flow of the water by digging the ditches we have mentioned. These ditches undoubtedly contributed to the injury suffered by plaintiffs by increasing the discharge through the drain. Where parties contribute to damage which has been caused by their acts and the acts

of another they cannot escape liability because their proportionate contribution is not accurately measured. *Reclamation District No. 833 v. American Farms Co.*, 209 Cal. 74, 285 P. 638.

[6, 7] Defendants complain bitterly of the findings of the trial court. It must be admitted that several of the findings were drawn upon a theory not supported by the law applicable to the case. These findings were not carried into the judgment. As we have seen, the judgment awarded damages to plaintiffs. This award is supported by the evidence and findings. It enjoined plaintiffs from interfering with the natural flow of surface water across their property. This is supported by the evidence and findings, and is in accord with the law of this state. It enjoined defendants from causing surface water to flow onto land of the plaintiffs by artificial means. This is supported by the evidence and findings and the law applicable to the case. The ditches dug by defendants were the only unlawful artificial means shown to have been employed by them which contributed to the damage suffered by plaintiffs. However, that they did contribute to this damage is established and is sufficient to support the judgment. The judgment, as we interpret it, only restrains defendants from increasing the natural flow of surface waters from their property by unlawful artificial means, such as dug ditches, not by the lawful grading and leveling of their property which left unchanged the general natural slope of that part of the country. The other findings, which were not carried into the judgment, may be treated as surplusage and disregarded. *Morris v. Turley*, 94 Cal. App. 691, 271 P. 916.

Defendants contend that the complaint fails to state facts sufficient to constitute a cause of action. Without extending this opinion by a detailed analysis of that pleading it is sufficient to say that while it should not serve as a model for future use it is not vulnerable to that attack.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

**DIETLIN v. GENERAL AMERICAN LIFE
INS. CO. (two cases).***

Civ. 9388.

District Court of Appeal, First District,
Division 1, California.

March 1, 1935.

Rehearing Denied March 30, 1935.

Hearing Granted by Supreme Court
April 29, 1935.

1. Appeal and error ⇨994(3)

Credibility of witnesses was for trial court sitting without jury.

2. Appeal and error ⇨1011(1)

Trial court's finding, upon conflicting evidence, that disability of plastering contractor who fell from scaffolding on February 18, 1929, was partial and not total after November 22, 1929, within accident policy, would not be disturbed.

3. Appeal and error ⇨1011(1)

Rule that trial court's finding upon conflicting evidence will not be disturbed applies not only to conflict between witnesses for respective parties, but between witnesses for same party.

4. Insurance ⇨526

Where accident policy provided that total disability existed where plastering contractor was disabled from performing "any and every kind of duty" pertaining to his occupation, and that partial disability existed where he was disabled from performing "one or more important daily duties" pertaining to his occupation, contractor held only "partially disabled" where he was able to perform some duties pertaining to occupation.

[Ed. Note.—For other definitions of "Partial Disability," see Words & Phrases.]

5. Appeal and error ⇨1060(1)

In action on accident and life policies, alleged misconduct of insurer's counsel in suggesting that moving pictures were in existence which showed insured performing labor which he claimed he was unable to perform held not prejudicial on ground that court denied insured's motion to strike statement made by insurer's counsel respecting fraud on part of insured or his attorney, where action was tried without jury and motion was not directed to any statement concerning photographs, and it did not appear that court was affected by suggestion.

6. Pleading ⇨365(2)

Motion to strike must be directed with precision to matter sought to be stricken.

7. Insurance ⇨669(12)

In plastering contractor's action on accident policy, testimony that if contractor was unable to perform any duty he was unable to perform all, and that therefore if partial disability was shown total disability would follow, held properly excluded, where policy provided that total disability existed when contractor was disabled from performing "any and every kind of duty" pertaining to his occupation and that partial disability existed if he was unable to perform some duties, and offered testimony did not tend to show that his duties were to be considered as a unit.

8. Trial ⇨29(1)

Where insured's counsel in action on accident policy asked witness whether insured uttered exclamation of existing pain and suffering and witness replied, "He did; all the time," court's statement that court did not think pain and suffering entered into case could not be predicated as error, where insurer's counsel in answer to court's remark stated that "this is merely preliminary," and court said, "Let's proceed."

9. Pleading ⇨121(3)

In action to recover disability benefits under life policies, insurer's denial on information and belief that proof was furnished held insufficient, since whether proof was furnished was presumptively within insurer's knowledge.

10. Insurance ⇨560(1)

Insurer waived defense of want of proof of disability under life policies where presumably, with full knowledge that no proof of disability was given, insurer went to trial, participated in appeal, and raised issue of want of proof only on second trial almost three years after original complaint was filed.

11. Insurance ⇨559(2)

Denial of all liability for disability benefits under life policies is waiver of condition requiring proof of disability if it be condition precedent to recovery.

12. Insurance ⇨528

Insured who according to terms of life policies was presumptively permanently disabled held not entitled to payments for permanent disability, where, at time proofs were made, it appeared that his disability was in fact not permanent.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Actions by Eugene Dietlin against the Missouri State Life Insurance Company, which was substituted by the General American Life Insurance Company. From judgments, plaintiff appeals.

Affirmed.

Edmund J. Holl and George Olshausen, both of San Francisco, for appellant.

Myrick & Deering and Scott, of San Francisco, for respondent.

HELD, Justice pro tem.

Missouri State Life Insurance Company, a corporation, issued to plaintiff and appellant three policies of insurance, each providing for disability payments. One of these policies we designate herein as the "accident policy," and the other two as the "life policies." The provisions as to disability payments in the life policies are identical, but differ from those in the accident policy. The plaintiff was a plastering contractor, and on February 18, 1929, while the above-named policies were in force, he fell from a scaffolding and sustained injuries consisting of fractures of the bones of both heels and a wrenched back. For four months immediately following the accident he was confined to a hospital; thereafter he remained at his home in San Francisco for a month, and then upon the advice of his physician he went to Healdsburg. There he remained until November 22, 1929, at which time he returned to his home in San Francisco. The trial court found that total disability of plaintiff existed until his return from Healdsburg, and that thereafter he was partially disabled only.

The accident policy provided for weekly payments of \$50 each during the period of total disability, so long as the assured might live, and \$25 per week during the period of partial disability, but not exceeding fifty-two consecutive weeks. The life policies provided for payments of \$10 per month for each \$1,000 of the face amount of the policies, if the assured became totally and permanently disabled within the definition of the policies, viz., if the disability be such as to prevent the assured then and at all times thereafter from engaging in any gainful occupation.

No payments were made by defendant under the life policies. After the accident, payments on the accident policy to the extent of \$1,107.14 as disability indemnity, and \$750 hospital indemnity, were made by defendant. Defendant conceded further payments were

due under the accident policy, but a dispute arose as to the extent of the period for which plaintiff was totally disabled within the meaning of the accident policy, and as to whether the disability was at all total and permanent under the life policies. Thereupon actions were instituted by plaintiff on the policies. These actions were consolidated and tried together in the court below. Separate judgments were entered in favor of plaintiff, and defendant appealed. The judgments were reversed. *Dietlin v. Missouri State Life Insurance Company*, 126 Cal. App. 15, 14 P.(2d) 331, 15 P.(2d) 188. A second trial was had, the order of consolidation remaining in effect. At the opening of the second trial, an amendment to the answer on the life policies was permitted by the court, which amendment will hereafter be referred to. On the second trial plaintiff had judgment on the accident policy for the sum of \$2,208.52. The court found that total disability of plaintiff had terminated on November 22, 1929, and the sum so awarded plaintiff was the aggregate amount (less payments theretofore made) of weekly payments of \$50 each from February 18, 1929, to November 22, 1929, and fifty-two weekly payments of \$25 each, the maximum period allowed by the policy for partial disability. In addition, the judgment included \$30 for surgical attendance.

On the life policies, judgment went for defendant.

Plaintiff has appealed from both judgments, and the appeals are before this court on a single transcript. The Missouri State Life Insurance Company, which issued the policies, was dissolved after entry of judgment in the trial court, and pursuant to stipulation of the parties and order of court General American Life Insurance Company was substituted.

The difference in the language of the disability provisions of the two forms of policies involved here renders it necessary that the appeals be separately considered.

In his application for the accident policy the plaintiff stated his occupation as follows: "Plastering contractor—Office, estimating and supervising duties only."

The trial court found and defendant concedes that plaintiff was totally disabled from February 18, 1929, the date of the accident, to November 22, 1929, when plaintiff returned to San Francisco from Healdsburg. The court found, and defendant contends, that after November 22, 1929, the disability of plaintiff was partial only. Following these find-

ings, the court, as heretofore stated, awarded plaintiff \$50 per week from February 18, 1929, to November 22, 1929, and \$25 per week thereafter for fifty-two weeks, less payments theretofore made. Defendant contends that these findings are in accordance with the decision on the prior appeal. The plaintiff, however, claims that by reason of additional evidence produced by him on the second trial, he has established total disability without interruption to the month of July, 1931. At the opening of the second trial, his contention was that total and permanent disability existed even then.

The accident policy provides that total disability exists where the injuries disable the insured from performing "any and every kind of duty pertaining to his occupation." Partial disability exists where such injuries disable him from performing "one or more important daily duties pertaining to his occupation." The trial court found that his injuries disabled plaintiff from the date of the accident to and including the 22d day of November, 1929, "from performing any and every kind of duty pertaining to his occupation; that said total disability did not continue subsequent to said 22nd day of November, 1929." The court also found that said injuries disabled plaintiff from the 22d day of November, 1929, and for a period of fifty-two weeks thereafter "from performing one or more important daily duties pertaining to his occupation."

The nature of the duties of plaintiff in following the occupation of "Plastering contractor—Office, estimating and supervising duties only" was testified to by plaintiff. In the performance of his office work, he was required to visit the offices of various contractors and obtain plans of work to be done. At his office, he made estimates of the cost of such work and the amount of his bid therefor. His office was in his home. If he was awarded a contract on his bid, he would then be required to go upon the job twice a day, and go over the job to take measurements for different ornamental work. He testified that this required his personal attention, which no foreman could do, but had to be done personally. He further testified that in supervising the work it was necessary that he ascend ladders and climb on scaffolds. On cross-examination he testified that on some jobs he had a foreman, and that others he supervised in person. He admitted also that in another action arising out of this accident his deposition was taken, and that he then testified as follows:

"Q. Well, ordinarily in your contracts do you actually do the work? A. No.

"Q. You just superintend the work? A. I have a foreman on the job to run my work, and I just come to the job to see what is needed, and take the time of the men, and have a talk with my foreman and leave.
* * *

On the trial he admitted that he had made these statements, and that the same were true. The trial court was therefore justified in accepting such statements as correctly setting forth the duties devolving upon him as a plastering contractor.

The plaintiff on the second trial testified unequivocally that until July, 1931, he could do no office work. Also, that "because my feet hurt me too much" he was nervous and unable to concentrate, and as a result could do neither estimating nor supervising work. On the first trial Dr. Dresel, who attended plaintiff following the accident, was asked: "Q. So far as estimating, as far as placing valuations upon work, as far as entering into contracts as a contracting plasterer, so far as supervising, except the pain, he cannot climb, possibly, but the man has been perfectly competent to perform all other duties in connection with his occupation. That has reference to a mental belief. * * * A. I believe so." Again: "Q. What would you say as to his condition at the present time with reference to his ability to perform the duties of supervising plastering work? A. He will be able to do everything except climb scaffolds and ladders."

On the first trial Dr. Dresel estimated the distance that plaintiff could walk at not to exceed 20 blocks. His notes produced on the second trial showed that on March 10, 1930, the plaintiff walked half a mile with the use of a cane. This witness also testified on the first trial that plaintiff could operate an automobile.

Dr. Dresel on the second trial testified to a much greater disability of plaintiff and stated that he had on the previous trial understated the seriousness of the condition of plaintiff. The record here shows also that plaintiff now makes no claim for total disability after July, 1931, and yet on February 18, 1933, he made a claim for total disability on a policy with California Western States Life Insurance Company and Dr. Dresel accompanied this claim with his written statement that the plaintiff was then totally disabled. The trial court was called upon to determine the credibility of the witnesses, and may have

chosen to accept the testimony given by Dr. Dresel on December 3, 1930, at the first trial.

On the first trial, the only witnesses to support the case of plaintiff were the plaintiff himself and Dr. Dresel, and the District Court of Appeal held that the evidence did not warrant a finding of total disability after November 22, 1929. Plaintiff claims, however, that the additional evidence produced on the second trial demands a finding of total disability until July, 1931. The witnesses who testified on behalf of plaintiff on the second trial, other than plaintiff and Dr. Dresel, were B. F. Barnard, Olga Dietlin, the wife of plaintiff, Carol Dietlin, their son, and Dr. George J. McChesney. Barnard was the man at whose premises in Healdsburg plaintiff spent several months prior to November, 1929. He did not see plaintiff after the latter left Healdsburg; nor does the testimony of this witness indicate that plaintiff was totally disabled when he left Healdsburg. The witness Dr. McChesney first met plaintiff in December, 1930, and testified that plaintiff was then totally disabled. However, when the attention of the witness was called to the nature of plaintiff's duties, he admitted that if they consisted of office work only, to be performed in plaintiff's home, the plaintiff could do such work. The substance of Dr. McChesney's testimony is that it would cause plaintiff some pain and inconvenience to stand on his left foot, but that such pain would not disable him from performing at least some of the duties of his occupation. There is nothing in the testimony of Dr. McChesney that refutes the theory of defendant that plaintiff was only partially disabled on November 22, 1929, more than one year before Dr. McChesney even met plaintiff.

We have carefully reviewed the testimony of Mrs. Dietlin and Carol Dietlin. Nothing therein adds weight to plaintiff's contention that he was totally disabled after his return from Healdsburg. Their testimony was in the main a recital of subjective symptoms manifested by plaintiff.

[1] On the previous appeal the reviewing court pointed out wherein the evidence was lacking to establish total disability after November 22, 1929. During total disability, plaintiff was entitled to receive \$50 per week. Total disability once terminated could not be reinstated, even though that condition should again result, for under the terms of the policy the totality must be continuous. Any interruption would terminate all payments except to the extent of \$25 per week for fifty-

two weeks. The trial court here was vested with the power of judging of the credibility of the witnesses, and in the exercise of that function may have had in mind the temptation on the part of plaintiff to magnify the seriousness of his condition. The testimony of his wife and son and that of Dr. Dresel, that plaintiff was under greater disability than previously appeared, was predicated largely upon acts and conduct of plaintiff, the genuineness of which the witnesses could not test.

At the beginning of the second trial plaintiff contended that at that time (March 27, 1933) the total and permanent disability of plaintiff existed. However, during the trial it appears that the contention of plaintiff was modified, for on April 26, 1933, the record shows: "Our claim goes only until July of 1931, and we are making no claim here beyond July, 1931, of any claim of total and permanent disability." This concession is inexplicable. If plaintiff was totally disabled after July, 1931, no reason is apparent why he should waive payment of any sums to which he might be entitled. The trial court might have well attributed this concession to the fact that following the claim of plaintiff's total disability at that time, the attorney for defendant indicated by his examination of one of the witnesses that evidence was in existence which would show that plaintiff was actually engaged for several days shortly preceding the trial in the manual labor of plastering, and did such work upon a scaffold, and therefore could not then be totally disabled. If the trial court adopted this view, the concession by plaintiff operated to discredit his case. The plaintiff admitted on the trial that he had done certain manual labor on March 5, 6, and 7, 1933. He admitted also that on March 16, 1933, when a representative of the defendant called upon him, he denied that he was able to do such work. On March 18, 1933, when this same representative found him at work, he admitted that that which he had previously stated as to his condition was not true.

The present case is one where the conclusion of the trial court is based on conflicting evidence. Not only did the trial judge observe the conduct and demeanor of the witnesses, but he had an opportunity to observe the physical condition of plaintiff and his ability to move about.

[2, 3] The finding that total disability of plaintiff did not continue subsequent to the 22d day of November, 1929, is based, as we

have seen, upon conflicting evidence, and the action of the trial court will not be disturbed. The rule as to conflict applies not only to a conflict between the witnesses for the respective parties, but between the witnesses for the same party. 2 Cal. Jur. 930: *Frazee v. Fox Film Corp.*, 45 Cal. App. 661, 188 P. 286.

[4] Appellant contends also that even though he was disabled only from performing a material part of his duties as a plastering contractor, he was nevertheless totally disabled within the meaning of the law. It is established by the evidence that on November 22, 1929, the appellant was not able to climb ladders and scaffolds, and also that as a part of his duties as plastering contractor he was required to do so. The policy provides that total disability exists where the injuries disable the insured from performing "any and every kind of duty pertaining to his occupation." On the other hand, partial disability exists where he is disabled from performing "one or more important daily duties pertaining to his occupation." Appellant complains that the trial court applied a literal construction to the words "total disability." We fail to see how the term could have been construed otherwise. He is not totally disabled unless he is prevented from performing "any and every kind of duty pertaining to his occupation." If he is disabled only to the extent of being unable to "perform one or more important daily duties," he is within the definition of the term "partial disability."

There is no contention that it is necessary that appellant be helpless and unable to perform any of his daily duties, to constitute total disability. However, where he is disabled only from performing one or more of those duties, and is able to perform others, he is only partially disabled. It was so held on the former appeal, where it was said: "Although the evidence was sufficient to show that after November 22, 1929, he was disabled from performing 'one or more important daily duties pertaining to his occupation', such disability was clearly a partial disability and not a total disability as defined in the policy as he was not disabled from performing 'any and every duty pertaining to his occupation.'" We adhere to the construction placed upon the language of the policy on the former appeal.

[5, 6] Appellant complains of alleged misconduct of counsel for respondent in suggesting at the trial that moving pictures were in

existence which showed appellant performing labor which he claimed he was unable to perform. It is conceded that "certain" photographs of plaintiff were taken by a representative of defendant company, but what those photographs showed does not appear, nor whether they were still or moving pictures. In the cases cited by appellant where alleged misconduct of counsel was relied on, trial was in every instance before a jury. Here the case was tried by the court without a jury. Appellant contends, however, that the trial judge was prevented from passing on the merits of the case by the injection into the case of false quantities, and that therefore the usual presumption that a judge is uninfluenced by extraneous matter does not hold. Certain remarks of the trial judge are relied on to indicate that he was so influenced. But we do not so understand the record. The trial judge stated with reference to moving pictures, "if the facts as indicated will be developed—I don't know whether they will or not." This would indicate that the court did not then assume that such pictures existed, nor that they would be produced. His mind was entirely open and unaffected.

The fact that, subsequently, the court denied the motion of plaintiff to strike from the record any and all statements made by the attorney for defendant as far as any fraud on the part of plaintiff or his attorney is concerned, is no indication that the court considered as proven the existence of moving pictures of plaintiff at work. The motion was not directed to any statement concerning the photographs. A motion to strike must be directed with precision to the matter sought to be stricken. 24 Cal. Jur. 778. This was not done here.

We are satisfied from a careful review of the record that the trial court was in no manner affected by any statement of counsel for plaintiff as to the existence of photographs.

[7] Appellant contends also that the trial court in excluding testimony which plaintiff sought to elicit and tending to show that the nature of plaintiff's duties was such that if he was unable to perform any thereof, he was unable to perform all, and that therefore if partial disability was shown, total disability would follow. We are satisfied that the trial court followed only the decision on the previous appeal in holding that after ability of plaintiff to perform certain substantial portions of his daily duties had been admitted by plaintiff, proof that he could not perform cer-

tain other important portions of those duties was not relevant. Furthermore, the offer of proof made by plaintiff did not tend to show that his duties were to be considered as a unit or as a whole. The offer was merely to prove that as a part of the supervising duties of a plastering contractor, it was necessary for him to inspect the premises and to climb ladders and scaffolds in doing so. The offer did not go to the extent that if plaintiff could not climb ladders and scaffolds, he could perform none of the duties of a plastering contractor.

[8] Appellant urges also that "the court erred in holding pain to be no element of disability." The alleged error is predicated upon the following record. Plaintiff's counsel asked a witness concerning the plaintiff the following: "Now, during that time did he at any time utter any exclamation of existing pain and suffering?" The witness answered: "He did; all the time." Counsel for defendant made an objection after the question was answered, and the court stated: "I don't think your pain and suffering enter into this, do they?" Counsel for plaintiff stated that this "is merely preliminary" and the court said: "Let's proceed." No authority is cited by appellant in support of his contention that this was error, and we perceive none in the incident.

The disability clauses contained in the life insurance policies are essentially different from the above-quoted clauses found in the accident policy. These provisions contained in both of the life insurance policies were as follows:

"Total and Permanent Disability Benefit. The Company will pay to the insured a life income of Ten Dollars each month for each \$1000 of the face amount hereof if the said insured shall become totally and permanently disabled, as hereinafter defined, before attaining age sixty. The first payment of such income shall be made immediately upon receipt by the Company of due proof of total and permanent disability, and subsequent payments shall be made monthly thereafter as long as the insured lives and suffers such disability, and shall be in addition to all other benefits provided by this policy. * * *

"Total and permanent disability may be due either to bodily injuries or to disease, which must occur and originate while this policy is in full force after the first premium has been paid, and must be such as to prevent the insured then and at all times there-

after from engaging in any gainful occupation. Total Disability, as defined above, which exists and has existed continuously for not less than three months shall be presumed to be permanent. At any time after approval by the Company of the aforesaid proof and from time to time, but not oftener than once a year after disability has continued for two full years from the date of approval, it may demand of the insured proof of the continuance of such disability and the right to examine the person of the insured. Upon failure to furnish such proof or if it appears that the insured has recovered so as to be able to engage in any gainful occupation, the Company's obligations to pay further Disability Benefits shall cease and the insured shall be required to pay the premiums becoming due on this policy thereafter in accordance with the original terms thereof."

On the previous appeal, it was held that the disability clauses in the life policies created a conclusive presumption of permanent disability where total disability continuously existed for not less than three months, and entitled the assured to the disability benefits during the entire period that the total disability might continuously exist. The plaintiff was therefore held entitled to disability benefits under the life policies from the date of the accident to November 22, 1929. At the opening of the second trial defendant sought and was granted permission by the court, and filed, an amended answer whereby allegation VI of the complaint was denied for lack of information or belief. There are two allegations so numbered in the complaint, but it is apparent that the allegation referred to is that which reads as follows: "That said plaintiff Eugene Dietlin has fulfilled and performed all of the conditions, terms and agreements of said policy of insurance on his part to be performed, and that said plaintiff within sixty days before the commencement of this action, gave due notice and proof of injuries received by said plaintiff as aforesaid, and due notice and proof of total and permanent disability resulting therefrom." The court found: "That said plaintiff, Eugene Dietlin, has not fulfilled and performed all of the terms and conditions and agreements in said policy on his part to be performed, and that said Eugene Dietlin did not within sixty days before the commencement of this action or at any other time or at all give due or any notice of proof of injury received by plaintiff and of total and permanent disability resulting therefrom."

It thus appears that on the second trial the question whether proof of disability was furnished, and if so, whether it was timely, was raised for the first time.

The complaint on the life policies was filed on March 29, 1930. This pleading alleged the furnishing of proof. The original answer was filed on June 16, 1930, and did not deny that proof was furnished. The case was tried on these pleadings and judgment rendered; an appeal was taken and the appeal decided on September 15, 1932. The amended answer was filed on March 27, 1933. In that pleading, the giving of proof of disability was first denied, and then only for lack of information or belief.

The appellant urges now that the defense of want of proof must be deemed waived, because not sooner raised; and also that the denial is insufficient because made for lack of information or belief of a fact presumptively within the knowledge of defendant.

[9] It would seem that the defendant should have known and presumably did know when the original answer was filed that no proof of disability had been furnished. That was a fact presumptively within its knowledge. Therefore a denial on information and belief is insufficient. *Goldwater v. Oltman*, 210 Cal. 408, 292 P. 624, 71 A. L. R. 871. In *Janson v. Bryant*, 52 Cal. App. 505, 199 P. 542, 543, the following quotation from an earlier case is quoted with approval (*Mulcahy v. Buckley*, 100 Cal. 484, 35 P. 144): "It has been decided that an allegation of a verified complaint could not be controverted on information and belief when the alleged fact was presumably within the knowledge of the defendant, nor when the defendant had the means of ascertaining whether or not it was true."

[10] We therefore hold that there was no sufficient denial of proof of disability. Furthermore, almost three years intervened between the filing of the complaint and the filing of the amended answer which first raised the issue. Presumably, with full knowledge that no proof of disability was given, the defendant went to trial, participated in an appeal, and only when the case was on for trial the second time did defendant deny the furnishing of proof, which it contends was a necessary part of plaintiff's case in the first instance. The case comes squarely within the decision of this court in *Goss v. Security Insurance Co. of California*, 38 P.(2d) 188, decided after the oral argument herein.

[11] Furthermore, even if the issue had been properly and timely raised, it would seem that where as here the defendant denied all liability, there is a waiver of the condition requiring proof of disability, if it be a condition precedent to recovery. *Hill v. Mutual Benefit Health, etc., Ass'n*, 136 Cal. App. 508, 29 P.(2d) 285; *Wilkinson v. Standard Acc. Ins. Co.*, 180 Cal. 252, 180 P. 607; *Restatement of the Law [Contracts]*, § 306.

The parties to this action have assumed proof of disability to be a condition precedent to a recovery by plaintiff herein. If it is, such proof has been waived for two reasons; viz., the answer does not deny that proof was furnished, and denial of liability is waiver of proof. However, as we read the policies, the fact and time of proof of total and permanent disability are material only as determining the date on which the first payment of "income" is to be made. Until proof of total and permanent disability is made, the obligation does not mature, or in other words until proof is made no payment is due plaintiff; and nothing being due, he could not maintain an action. This is not because proof is a condition precedent to suit, but because proof fixes the time when payments first become due. In this case the plaintiff alleged "that said plaintiff, within sixty days before the commencement of this action, gave * * * due notice and proof of total and permanent disability * * *." The complaint containing this allegation was filed on March 29, 1930. This allegation was not adequately denied by defendant. Hence proof of disability was furnished to defendant not earlier than January 28, 1930. As we have already seen, the total disability, from which arose the presumption of permanent disability, terminated on November 22, 1929. Thereafter the presumption could no longer operate as against the fact established contrary to the presumption; and therefore plaintiff was not permanently disabled on November 22, 1929, for the evidence does not show that after November 22, 1929, the plaintiff was prevented "from engaging in any gainful occupation." The effect of the decision on the former appeal in denying plaintiff disability payments after November 22, 1929, was that the presumption must yield to the fact.

The question then arises whether an insured who according to the terms of the policy is presumptively permanently disabled is entitled to payments for permanent disability if at the time proofs are made it appears that his disability is in fact not permanent.

This court in *Bagnall v. Travellers' Ins. Co.*, 111 Cal. App. 714, 296 P. 106, did not decide the question, but for the purposes of that case conceded that under the policy there involved, the assured must give notice of a claim during the existence of the total disability and before its termination. We have not been cited to any case decided in this state where this question has been determined. Counsel have called our attention to cases from other jurisdictions; but the rule that seems to us most just and reasonable is that enunciated in *Mackenzie v. Equitable Life Assur. Soc.*, 139 Misc. 288, 248 N. Y. S. 413, 414. That case is practically identical with the case now before us. The policy there provided: "Disability shall be deemed to be total when it is of such an extent that the insured is prevented thereby from engaging in any occupation or performing any work for compensation of financial value, and such total disability shall be presumed to be permanent when it is present and has existed continuously for not less than three months."

The insured there conceded that plaintiff was totally disabled for a period of six months and three weeks. Nine days after the disability ceased to be total, the plaintiff notified the insurer of his injuries, and defendant refused to recognize the claim because there was then no disability existing. The plaintiff relied upon the presumption of permanency. The court said: "The mere fact that the plaintiff was totally disabled for a period of three months will not entitle him to compensation if the total disability was not present at the time of the notification. The policy provides: '* * * and such total disability shall be presumed to be permanent when it is present and has existed continuously for not less than three months.' The provision regarding the creation of a presumption undoubt-

edly is contained in the policy for the benefit of the assured, for in a case where an assured presented a claim at the expiration of three months and the total disability was present, but it could not be determined whether it would be permanent or not, the assured would not be deprived of the benefits under the terms of the policy, and the presumption of permanency would continue until rebutted by the company. However, the distinction arising in the case at bar is that the total disability was not present at the time the plaintiff presented his claim to the defendant, and therefore there could not be any presumption of permanency."

[12] So in the case at bar, the disability existing at the time proof was made as alleged in the complaint was not permanent in fact, within the meaning of the policy. Plaintiff could not recover for a permanent disability when there was no permanent disability, either actually or presumptively, at the time of proof. We do not hold that plaintiff would not have been entitled to compensation had he made proof thereof at any time after three months following the accident and prior to November 22, 1929.

It may not be successfully contended that the evidence established proof at a date earlier than that alleged in the complaint, and that therefore the doctrine of the case of *Azareello v. Bessolo*, 87 Cal. App. 272, 262 P. 66, applies, for the only proof furnished here was not that plaintiff was disabled "from engaging in any gainful occupation," but that he was disabled "from performing any and every kind of duty pertaining to his occupation." For aught that appears, he may have been able to engage in other gainful occupation.

The judgment in each case is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

CALIFORNIA REPORTER

IN VOLUME

42 PACIFIC REPORTER

SECOND SERIES

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2 Cal.2d 504

COOPER v. KELLOGG et al.
Sac. 4901.

Supreme Court of California.

Feb. 26, 1935.

Rehearing Denied March 28, 1935.

1. Automobiles ⇐6

Guest's right to recover for injuries caused by gross negligence of host while driving automobile is determined by statute in effect at time of accident (St. 1929, p. 1580, § 141¼).

2. Automobiles ⇐244(20)

In action by guest against host for injuries in automobile collision, evidence which disclosed that host was driving on left side of highway, that approaching automobile was plainly visible, but that host made no attempt to avoid collision, justified inference that host was asleep at time of accident (St. 1929, p. 1580, § 141¼).

3. Automobiles ⇐242(1), 244(20)

In action by guest against automobile driver, evidence that driver fell asleep before collision establishes only prima facie case of ordinary negligence and is insufficient to warrant recovery under statute requiring showing of gross negligence, and places burden on driver to offer proof of circumstances in excuse or justification of his conduct (St. 1929, p. 1580, § 141¼).

4. Automobiles ⇐242(1)

In action by guest against driver for injuries when driver fell asleep before driving into another automobile, guest to recover must show that in light of surrounding circumstances there was a likelihood that driver while driving knew, or should have known, that he would fall asleep (St. 1929, p. 1580, § 141¼).

5. Automobiles ⇐245(24)

In action by guest against host for injuries caused when host fell asleep and drove into another automobile, whether host was guilty of gross negligence is question of fact, even though evidence is not conflicting, if different conclusions can rationally be drawn therefrom (St. 1929, p. 1580, § 141¼).

"Gross negligence" is want of slight care or an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interest and welfare of others.

[Ed. Note.—For other definitions of "Gross Negligence," see Words & Phrases.]

6. Automobiles ⇐244(20)

In action by guest against host for injuries when host fell asleep and drove automo-

bile into another automobile, evidence *held* not to justify recovery by guest on ground that host was guilty of gross negligence (St. 1929, p. 1580, § 141¼).

Evidence disclosed that driver was about 20 years old, had been up for 19 hours prior to the accident, had driven about 200 miles, had spent day in open watching a football game, and that driver at no time felt sleepy prior to time of accident, which occurred at 2 a. m.

7. Evidence ⇐471(17)

On issue whether injuries to guest were caused by gross negligence of host when driving automobile, testimony of host, that he must have been asleep at time of accident, *held* admissible, notwithstanding it was in the form of a conclusion (St. 1929, p. 1580, § 141¼).

8. New trial ⇐99

Action of trial court denying motion for new trial made on ground of newly discovered evidence rests largely in discretion of trial judge.

9. New trial ⇐99

In action by guest to recover for injuries when host fell asleep and drove into another automobile, refusal to grant guest's motion for new trial on ground of newly discovered evidence *held* not an abuse of discretion, where evidence, which consisted of alleged statements by driver that he was sleepy when he started to drive, was denied in driver's affidavit (St. 1929, p. 1580, § 141¼).

10. New trial ⇐105

Ordinarily, it is not proper to grant a new trial on ground of newly discovered evidence where evidence offered is merely designed to contradict a witness, particularly where truth of evidence is controverted by counter affidavits of opposing party, and trial judge has an opportunity of balancing weight and credibility of opposing affidavits.

In Bank.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by Jack M. Cooper, by Maree Barbara Roberts, his guardian ad litem, against Byrd W. Kellogg, also known as Mrs. Charles Kellogg, and another. From a judgment in favor of defendants, plaintiff appeals.

Affirmed.

Rehearing denied; CURTIS, J., dissenting. Prior opinions, 32 P.(2d) 685 and 31 P.(2d) 797.

James, Brann & Rowe, of San Francisco, for appellant.

Bronson, Bronson & Slaven and Harold R. McKinnon, all of San Francisco, for respondents.

THOMPSON, Justice.

[1] Jack M. Cooper, by his guardian ad litem, Maree Barbara Roberts, brings this action to recover damages for personal injuries received while riding as a guest with the defendant Beecher Kellogg, in a car belonging to the defendant Byrd W. Kellogg. Since the accident occurred on October 12, 1930, a finding of gross negligence upon the part of the driver will warrant a recovery by the guest under section 141½ of the California Vehicle Act as in effect at that time (St. 1923, p. 517 as added by St. 1929, p. 1580). *Stotts v. Blicke*, 220 Cal. 225, 30 P.(2d) 392.

Jack Cooper left Santa Rosa with the defendant Beecher Kellogg, who was at that time about 18 years old, at about 8 o'clock on the morning of October 11, 1930, for the purpose of driving to San Mateo to see a football game. No issue is made as to Cooper's status as a guest or the consent of Byrd W. Kellogg to the use of her car. The boys arrived at San Francisco about 10:30 a. m., lunched, and then went on to San Mateo. After the football game they drove back to San Francisco, had dinner and went to the theater, starting for Santa Rosa via the 12 or 12:30 Sausalito ferry. Arrived on the ferry, the defendant went upstairs and walked around. Cooper remained in the car and went to sleep, awakening when the boat docked and Kellogg drove off, at which time he asked defendant whether he wanted him to stay awake and talk to him or whether it was all right for him to continue sleeping; to which Kellogg replied that he was not sleepy, and that "it would be all right if he (Cooper) went to sleep." Cooper awoke once more when they passed an automobile accident on the highway, then went back to sleep and woke again in the hospital at Petaluma. Kellogg testified that he felt no sleepiness on the boat or when Cooper questioned him as they drove off; that the left-hand window of the car was open, it was raining slightly and there was a cool wind; that the wind and rain acted as a stimulant, if anything; that his average speed was around 35 miles an hour, and traffic was very light. He does not recall feeling any sleepiness at all, but remembers taking a curve just north of Novato and some straight road after that, and his next recollection is the hospital. He did not see at all the car which he hit. He testified he had no premonition or warning of sleepiness at all. The court then asked him,

overruling the plaintiff's objection that it was incompetent, irrelevant, and immaterial: "Were you asleep?" Kellogg replied, "I must have been asleep," and, when questioned as to whether he knew he was asleep, said "No, that seems to be the only logical conclusion to be drawn."

In this situation the only actual witness of the accident itself is William Dresbach, the driver of the car with which the Chevrolet driven by Kellogg collided. Dresbach's testimony is as follows: He was driving south on the main highway between Petaluma and Novato (it is stipulated the accident took place about 6 or 7 miles south of Petaluma); that the highway is about 20 feet wide, with unpaved shoulders about 10 feet wide on each side, and for about a quarter of a mile on each side of the point of collision is level and straight; that the center line of the highway is marked by a joint in the paving and that there was a slight rain, but the visibility was good; that he observed the lights of the Kellogg car when it was about a quarter of a mile away and, at a distance of about 150 yards, saw it make a slight turn and begin to come over on his side of the highway; that he was puzzled, as there was no other car in the road for Kellogg to pass, and, as the Chevrolet continued "quartering across the highway" Dresbach pulled off the highway entirely and had almost come to a complete stop when the Chevrolet hit him almost head-on. Dresbach further testified that the Chevrolet was either entirely off the highway on Kellogg's left-hand side, or almost off; that the speed of the defendant's car was about 20 miles an hour when it struck him, and the lights of both cars were burning. The accident occurred about 2 a. m.

Upon this testimony, the trial court found that the defendant Beecher Kellogg did not operate the automobile in a grossly negligent manner, and, in its order for findings, discloses the rationale of this conclusion by saying: "From the evidence herein, independent of the answer of the witness to the court's interrogatory to which plaintiff objected, the conclusion is irresistible, in fact, it appears to be the only logical one, that at the time of the collision defendant Beecher Kellogg was asleep. Under these circumstances was Beecher Kellogg guilty of gross negligence? The determination of this question depends upon whether defendant Beecher Kellogg was grossly negligent in permitting himself to fall asleep, rather than whether he was negligent in the manner in which he controlled the car, since he could not be held negligent for his actions after

he had fallen asleep. * * * In the instant case defendant Beecher Kellogg testified that at no time prior to the collision did he experience a feeling of sleepiness or any warning of impending sleep. Had he received such a warning and continued to drive his automobile despite the same, or had he continued to drive with knowledge that sleep was imminent or with consciousness of 'feeling drowsy,' this Court has no doubt that the charge of gross negligence could be sustained. However, those are not the facts. * * * Beecher Kellogg has testified positively that he received no premonition of sleepiness—no consciousness of feeling sleepy. In view of the demeanor of the witness and the character of his testimony, this Court feels that such testimony cannot—nor should it—be disregarded." From a judgment in favor of the defendant, the plaintiff appeals.

The appeal is prosecuted upon the grounds that (1) the uncontradicted evidence requires a finding of gross negligence upon the part of Beecher Kellogg, (2) the trial court committed error in overruling the plaintiff's objection to its question to Beecher Kellogg, "Were you asleep?" and (3) it was error to deny plaintiff's motion for a new trial made upon the ground of newly discovered evidence.

[2] The inference drawn by the trial court that Beecher Kellogg was asleep at the time of the accident is reasonable in the light of the circumstances of the accident. According to the uncontradicted testimony of Dresbach, Kellogg drove his car down the wrong side of the highway in full view of the approaching car, and without making any attempt to stop or return to his own side of the road. This supports Kellogg's own testimony that he never saw the Dresbach car. In view of the testimony that the visibility was good, that Dresbach saw the lights of the Chevrolet about a quarter of a mile away, that his own lights were burning and that there was little other traffic, it seems hardly probable that Kellogg would have failed to see the car had he been awake, or that if he had not been asleep he would have driven clear off the highway to his left. In *Stotts v. Blickle*, 220 Cal. 225, 227, 30 P.(2d) 392, 393, this court said: "At about 5 p. m. he was driving along a clear highway, about thirty miles per hour, when suddenly the car left the pavement and for about one hundred and fifty feet was off the road, until it struck a power pole located about seven and one-half feet from the edge of the highway. Defendant did not apply the brakes, and made no attempt to turn the car back to the

road. The deceased's mother, sitting in the back, called to him twice. He apparently did not hear the first call, but at the second he swerved the car and struck the pole a glancing blow which threw the deceased out of the car and killed him. Defendant's declarations and testimony, together with the foregoing circumstances, established by several witnesses, justified the inference that he dozed off at the time of the accident." It is true that in the *Stotts Case* the defendant had felt drowsy as a result of lack of sleep the night before, while in the case at bar much point is made of the testimony of the defendant that he did not at any time feel sleepy, and that the rain and wind from his open window had a stimulating effect. In *Bushnell v. Bushnell*, 103 Conn. 583, 131 A. 432, 44 A. L. R. 785, it is said that sleep does not ordinarily come upon one without some premonition or warning of its approach, but that this circumstance is one of the considerations which must be weighed in determining the fact of negligence. In fact, the inference of sleep or a light doze is to our minds much more reasonable than the alternative that, on a straight highway, at night, with little traffic and a sleeping companion, hence no scenery or conversation to distract him, the defendant simply did not see the approaching car and yet was wide awake. An inference of sleep was held to be reasonable under very similar circumstances in *White v. Stanley*, 169 Wash. 342, 13 P.(2d) 457.

[3,4] In *Stotts v. Blickle*, supra, falling asleep at the wheel was held to constitute gross negligence and warrant recovery by a guest. There, however, as has been pointed out, the defendant knew he was drowsy from lack of sleep the night before. There was also the additional factor that the car was, to defendant's knowledge, not steering properly, and he failed to have it repaired. Hence this case is not authority for the proposition that falling asleep while operating a car is, in itself, gross negligence. In fact, the numerous cases examined in which the courts of other jurisdictions have considered this question are almost unanimously to the effect that the fact of falling asleep while driving is sufficient to establish a prima facie case of ordinary negligence only, whereupon it becomes incumbent upon the defendant to offer proof of circumstances in excuse or justification of his conduct, and that the question of the existence of that degree of negligence or misconduct which is necessary for a recovery under the particular "guest law" under consideration is a

question of fact for the jury or trial judge, to be determined in the light of the evidence and the inferences which may reasonably be drawn therefrom. Where more than ordinary negligence is required for recovery, the particular question becomes, whether, in the light of the surrounding circumstances, there was a sufficient likelihood, of which the defendant knew or should have known, that sleep would overtake him while operating the car to render him guilty of the degree of culpability necessary for recovery. See *Bushnell v. Bushnell*, 103 Conn. 583, 131 A. 432, 435, 44 A. L. R. 785; *Potz v. Williams*, 113 Conn. 278, 155 A. 211; *Freedman v. Hurwitz*, 116 Conn. 283, 164 A. 647; *Ryan v. Scanlon*, 117 Conn. 428, 168 A. 17; *Blood v. Adams*, 269 Mass. 480, 169 N. E. 412; *Devlin v. Morse*, 254 Mich. 113, 235 N. W. 812; *Manser v. Eder*, 263 Mich. 107, 248 N. W. 563; *Boos v. Sauer*, 266 Mich. 230, 253 N. W. 278; *Krantz v. Krantz*, 211 Wis. 249, 248 N. W. 155; *Kaplan v. Kaplan*, 213 Iowa, 646, 239 N. W. 682, 685; *Hardgrove v. Bade*, 190 Minn. 523, 252 N. W. 334; *Brownell v. Freedman*, 39 Ariz. 385, 6 P.(2d) 1115; *Whiddon v. Malone*, 220 Ala. 220, 124 So. 516; *Gilliland v. Harris*, 25 Ala. App. 549, 150 So. 184; *Gower v. Strain*, 169 Miss. 344, 145 So. 244.

Where the defendant has known he was sleepy, but has thought he would be able to complete his trip without actually going to sleep and so continued to drive, but has in fact slept at the wheel and had an accident because of it, the evidence has been held to justify a finding of reckless misconduct (*Potz v. Williams* and *Freedman v. Hurwitz*); gross negligence (*Ryan v. Scanlon* and *Blood v. Adams*); willful and wanton misconduct (*Manser v. Eder*). But see *Boos v. Sauer*, holding it was error to rule that because the driver felt sleepy it was gross negligence as a matter of law to continue to drive (gross negligence in Michigan involves willful and wanton misconduct), and *Kaplan v. Kaplan*, holding that the fact that the driver "was tired and facing the east sun and went to sleep cannot and does not raise any negligence there may have been in said act to the level of recklessness." All supra.

[5, 6] Gross negligence has been repeatedly defined in the California cases as "the want of slight diligence," "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and "that want of care which would raise a presumption of the conscious indifference to consequences." *Krause v. Rar-*

ity, 210 Cal. 644, 293 P. 62, 66, 77 A. L. R. 1327; *Kastel v. Stieber*, 215 Cal. 37, 8 P.(2d) 474; *Malone v. Clemow*, 111 Cal. App. 13, 295 P. 70, 72. Whether there has been such a lack of care as to constitute gross negligence is a question of fact for the determination of the trial court or jury, and this is so "even where there is no conflict in the evidence if different conclusions upon the subject can be rationally drawn therefrom." *Malone v. Clemow*, supra. Even in the light of the following circumstances which are urged upon our attention by appellant, that Kellogg was about 19 or 20 years old, that he had been up since 7 a. m., that the accident took place about 2 a. m. of the following day, that he had driven about 200 miles and had spent the day in the open at a football game, we cannot say that the only reasonable conclusion the trial court could reach was that there was such a likelihood of his falling asleep, of which he knew or should have been aware, that his continuing to operate the car amounted to gross negligence as defined above. Kellogg testified that he did not feel sleepy, but appellant insists that one cannot fall asleep without experiencing the ordinary feelings and symptoms of on-coming sleep. This question also falls within the province of the trier of the fact. In *Bushnell v. Bushnell*, supra, upon which the appellant places great reliance, the Connecticut court said: "It then becomes a question of fact whether or not the driver was negligent; and, in determining that issue, all the relevant circumstances are to be considered, including the fact that ordinarily sleep does not come upon one without warning of its approach."

[7] The trial court did not commit error in overruling plaintiff's objection to the question it asked of Beecher Kellogg, "Were you asleep?" The objection was made on the ground that the question was irrelevant, incompetent, and immaterial. The inquiry was obviously relevant and material; it did not call for a conclusion, except in so far as a great many statements as to the witness' own physical and mental condition are conclusions. It is true the answer is given in the form of a conclusion, but no motion to strike was made, and, for what it is worth, it supports the inference of sleep made by the trial court independently of the stated conclusion of the witness.

In support of his motion for a new trial the plaintiff offered affidavits, his own and those of his guardian ad litem and one Antone J. Trigeiro, to show, as newly discovered evidence, a conversation, a day or so before the

trial of the action, between the defendant and Trigeiro in which the defendant told Trigeiro that he had been up late the night before the accident and because of this fell asleep at the wheel, and that he was already sleepy when he left San Rafael on the way back to Santa Rosa. In opposition to those affidavits, Beecher Kellogg made his affidavit flatly denying the conversation and reiterating his statements that he did not know how the accident happened, but merely concludes from the circumstances that he must have fallen asleep and that he has no recollection of any feeling of sleepiness.

[8-10] The action of the trial court in denying a motion for new trial on the ground of newly discovered evidence rests largely in the discretion of the trial judge. *Maxwell Hardware Co. v. Foster*, 207 Cal. 167, 277 P. 324. Moreover, it is not ordinarily proper to grant a new trial where the evidence offered is merely designed to contradict a witness, especially where the truth of the evidence is controverted by counter affidavits of the opposing party, and the trial judge has an opportunity for balancing the weight and credibility of the opposing affidavits in passing upon the motion. *Waer v. Waer*, 189 Cal. 178, 207 P. 891. No abuse of discretion appears.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.



2 Cal.2d 537

KENNER v. SMITH et al.

Sac. 4833.

Supreme Court of California.

Feb. 27, 1935.

Sales 38(1)

Buyer is entitled to cancellation of contract to purchase leasehold interest and furniture and fixtures of hotel business, where sellers made false representation as to material fact respecting net income of business for purpose of deceiving and inducing buyer to purchase hotel business and expend money thereon and buyer relied thereon to her damage.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Bertha Kenner against Esther Smith, etc., and others. From an adverse judgment, named defendant and husband appeal.

Affirmed.

Clifford A. Russell and Wilson Craven, both of Sacramento, Thomas J. Horan, of Vallejo, and Joseph Raines, of Fairfield, for appellants.

H. Edward Manning, of Vallejo, and Kenneth I. Jones, of Fairfield, for respondent.

SHENK, Justice.

The plaintiff brought the action to cancel, on the ground of fraud and misrepresentation, a contract to purchase from the defendants a leasehold interest and the furniture and fixtures of a certain hotel business. The plaintiff had judgment, from which the defendants have appealed.

The defendants Esther Smith and Chester E. Smith were the owners of a leasehold interest in the Rialto Hotel in Sacramento, for which the plaintiff agreed to pay the sum of \$5,000, payable by applying \$500 thereof as a credit on a previous indebtedness, and the balance by the plaintiff's note for \$4,500 secured by a deed of trust on real property in Solano county. The plaintiff alleged, and the evidence is, that the defendants represented to her that the net income from the hotel, while it was being operated by the defendants, was between \$250 and \$300 per month, but that the business could be increased if the plaintiff would make some needed repairs, and refurnish and redecorate to the extent of about \$2,750.

The plaintiff took possession pursuant to the consummated transfer, and immediately carried out the plan to make the repairs and to refinish and refurnish the rooms, without closing the hotel business for that purpose. The business, however, produced a loss, and the plaintiff, after sixty days' occupancy, was given notice to vacate because of nonpayment of rent. She gave to the defendants notice of rescission.

The trial court rendered judgment canceling the promissory note of the plaintiff and the deed of trust securing the same, also canceling the credit of \$500. In addition, the plaintiff was awarded damages in the sum of \$559.84, representing the sum expended by her for light fixtures, papering, painting, plumbing, and carpentering.

The defendants contend that the findings and judgment are not supported because the

fact that the hotel business was conducted at a loss might have been due to the change in management and policy, and the partial interruption of the business by the repairing and refinishing, pursued by the plaintiff in reliance merely on the expression of the opinion of the defendants not amounting to a representation of a material fact. If the only representation made by the defendants related to the possible future earnings under the change of policy suggested by them, precedent could be found to support the contention. But here there was a representation as to a material fact, viz., that, while the defendants conducted the business, it produced a net income of \$250 to \$300 a month. There is sufficient evidence to support the trial court's finding that the representations in that respect were false, were known by the defendants to be false, and were made by them for the purpose of deceiving the plaintiff and inducing her to purchase the hotel business and expend moneys thereon, and that the plaintiff relied thereon to her damage. In such a case the plaintiff is entitled to recover. *Nisson v. Hood*, 140 Cal. 224, 73 P. 981; *Del Vecchio v. Savelli*, 10 Cal. App. 79, 101 P. 32; 25 Cal. Jur. 557, 558.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; THOMPSON, J.



2 Cal.2d 485

SOUTH SAN JOAQUIN IRR. DIST. v.

NEUMILLER, Tax Collector.

S. F. 15202.

Supreme Court of California.

Feb. 25, 1935.

1. Constitutional law ⇨233, 290(7)

Waters and water courses ⇨216

Statute authorizing irrigation district to purchase property which has been deeded for delinquent taxes to the state and the irrigation district *held* not unconstitutional as depriving persons entitled to redeem property of their redemption rights without due process and equal protection of law, since person possessing right to redeem has no vested right in method adopted by state for disposi-

tion of tax deeded lands (Pol. Code § 3817, and § 3897d, as added by St. 1933, p. 2580).

2. Taxation ⇨679(5)

In absence of constitutional limitations, Legislature can dispose of state's tax deeded lands in any way deemed by it to be for the public interest, and is not confined to a disposal at public auction for cash but, in absence of self-imposed restrictions, may dispose of lands at private sale for cash or on credit (Pol. Code, §§ 3480, 3817).

3. Constitutional law ⇨208(1)

Statute providing for purchase by irrigation district of lands deeded to state and district for delinquent taxes or assessments *held* not void as special legislation, in that it does not apply to all lands held by state under tax deeds, but is confined to lands deeded to state for delinquent taxes or assessments, which lands have also been deeded to an irrigation district or other public agency for delinquent taxes or assessments (Pol. Code, § 3897d, as added by St. 1933, p. 2580).

4. Statutes ⇨123(6)

Statute providing for purchase by irrigation district of lands deeded to state and irrigation district for delinquent taxes and assessments *held* not unconstitutional on ground of invalid title (Pol. Code, § 3897d, as added by St. 1933, p. 2580; Const. art. 4, § 24).

5. Statutes ⇨47

Statute providing for purchase by irrigation district of lands deeded to state and irrigation district for delinquent taxes and assessments *held* not invalid because it is uncertain in its terms (Pol. Code, § 3897d, as added by St. 1933, p. 2580).

In Bank.

Application for writ of mandamus by the South San Joaquin Irrigation District against W. C. Neumiller, as Tax Collector of the county of San Joaquin.

Peremptory writ issued.

Nutter & Rutherford, of Stockton, and Hankins & Hankins, of San Francisco (A. L. Cowell, of Stockton, of counsel), for petitioner.

Neumiller & Ditz, of Stockton, for respondent.

SIENK, Justice.

This is an application for a writ of mandamus to compel the respondent, as tax collector of the county of San Joaquin, to give notice of the making of certain agreements between the board of supervisors of said coun-

ty and the board of directors of South San Joaquin Irrigation District pursuant to section 3897d of the Political Code, enacted in 1933 (Stats. 1933, p. 2580).

In pertinent respects the foregoing section provides that whenever any property has been deeded for delinquent taxes or assessments to the state, and the same property has also been deeded for delinquent taxes or assessments to an irrigation district, the board of directors of the district may enter into an agreement with the board of supervisors of the county in which the property is situated, subject to the approval of the state controller, for the purchase of, or for an option to purchase, the property so held by the state; that any such agreement may provide for the price for which and the terms on which the property shall be sold; that when the agreement has been approved by the state controller, he shall by written authorization direct the tax collector of the county to cause notice of the making of the agreement to be given by publication or posting, which notice shall describe the property and shall state the names of the person or persons to whom the property was assessed for the year or years of delinquent payment of taxes; that said notice shall also state that an agreement for the sale of the property has been made by the board of supervisors of the county with the public agency named in the agreement; that the tax collector shall mail a copy of the notice to the persons to whom the property was last assessed next before the making of the agreement; that the agreement shall not become effective until twenty-one days after the first publication of the notice; that if within said 21-day period the property is redeemed as elsewhere provided for in the Political Code, or if the property is so redeemed before the purchaser shall have complied with the terms of purchase, the agreement shall be null and void, but if the property is not so redeemed then, whenever the purchaser shall have complied with the terms of purchase, the tax collector of the county shall execute and deliver to the purchaser a deed to the property in the form provided; that upon the execution of the deed all rights to redeem the property shall be terminated, and the deed shall, except for fraud, be conclusive evidence of the performance of all of the requirements of the section and shall otherwise have the same effect as evidence and as a deed issued in accordance with section 3898 of the same Code.

It appears from the petition that within the boundaries of the irrigation district there are located the three parcels of real property particularly described and generally called par-

cels 1, 2, and 3; that prior to December 1, 1933, each of these parcels had been deeded to the district by its tax collector for assessments levied in 1927, which assessments remained delinquent, unpaid, and unredeemed, more than three years prior to the deed to the district; that said real property is also located within the county of San Joaquin and subsequent to 1925 had been levied upon by the authorities of that county for county taxes; that these taxes had become delinquent and the land had been sold to the state; that prior to the 1st day of December, 1933, and after the expiration of more than five years subsequent to the sale to the state the land had been deeded to the state and that no redemption had been made; that on December 18, 1933, three separate agreements, each affecting one of said parcels, were entered into wherein the board of supervisors of said county, as first party, agreed to sell, and the irrigation district, as second party, agreed to buy, the described land for a cash consideration of \$3.90 per acre, payable \$1.93 per acre upon approval of the sale and 39 cents per acre annually thereafter until the full purchase price is paid. Upon completion of the payments the first party agreed to execute to second party a deed as provided in section 3897d of the Political Code. In default of payment and 30 days' notice thereof the second party agreed to quitclaim its interest in the land to the first party. These agreements were approved by the state controller, whereupon by written authorization he directed the tax collector to cause the notice of the making of the agreements to be given as required by the statute. The tax collector refused to comply with the direction. Hence this proceeding.

[1,2] In support of his general demurrer to the petition the respondent contends that said section 3897d is unconstitutional and void for the reason that it would deprive persons entitled to redeem the lands affected of their rights to redeem, without due process of law, and would deny to them the equal protection of the law. It should first be noted that no question is here presented concerning the power or lack of power of the Legislature to shorten the 5-year period after the sale to the state within which redemption may be made, as provided in section 3780 of the Political Code, which section permits redemption "by the owner, or any party in interest, within five years from the date of the sale to the state, or at any time prior to the entry or sale of said land by the state, in the manner provided by section three thousand eight hundred and seventeen."

Nor is there any question here as to whether the Legislature may, after the deed to the state, so amend the law as to add new burdens or more onerous conditions to the right to redeem than existed when the sale was made. See *Teralta Land, etc., Co. v. Shaffer*, 116 Cal. 518, 48 P. 613, 58 Am. St. Rep. 194; *Johnson v. Taylor*, 150 Cal. 201, 88 P. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181. This is so for the reason that no such burdens or conditions were added or imposed by the enactment of section 3897d. The person having the right to redeem now has the same redemption right within the same time, on at least the same notice, and for the same amount, as he had before the section was enacted. The new section not only preserves to him those rights, but in reality extends the time for redemption until the purchasing district has complied with the terms of its contract. The question is therefore narrowed to this: Does the person possessing a right to redeem also have a vested or such a substantial right in the method or conditions adopted by the state for the disposition by it of its tax deeded lands as would deprive the state of the power to change the method and terms of sale thereof, after it had received title to the lands? In other words, and as applied to the present situation, has the person having the privilege of redemption, whose rights in that behalf are not made more burdensome or onerous by the subsequent legislation, the constitutional right to compel the state to dispose of its title to tax deeded lands at public auction for cash as provided by section 3817 of the Political Code as the same was in effect at the time of the sale to the state? The answer must be in the negative. In the absence of constitutional limitations, and there is none here, the Legislature is free to dispose of the state's tax deeded lands in any way deemed by it from time to time to be for the public interest. It is not confined to a disposal at public auction for cash but, where no self-imposed restrictions stand in the way, may dispose of said lands at private sale for cash or on credit. *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 241, 90 P. 936; *Fox v. Wright*, 152 Cal. 59, 91 P. 1005; *Merchants' Trust Co. v. Wright*, 161 Cal. 149, 118 P. 517; *In re Cowles*, 52 Nev. 171, 283 P. 400; 25 R. C. L., p. 388; 59 Cor. Jur., p. 166, 167; 61 Cor. Jur., p. 1234. In fact, the Legislature in section 3480 of the Political Code has provided for public or private sale, after a period of redemption of one year, of land deeded to the treasurer trustee of a reclamation district on account of delinquent assessment. It is clear from all the authorities and on reason that

the person having the privilege of redemption has no right to the disposition by the state of its tax deeded lands in any particular way when, as here, his right of redemption is not adversely affected.

[3] It is also insisted by the respondent that said section 3897d is void as special legislation, in that it does not apply to all lands held by the state under tax deeds, but is confined to lands deeded to the state for delinquent taxes or assessments, which lands have also been deeded to an irrigation district, or other public agency, for delinquent taxes or assessments. The legislation was doubtless deemed expedient following our decision in *La Mesa, etc., Irrigation District v. Hornbeck*, 216 Cal. 730, 17 P.(2d) 143, wherein it was held that the liens for county taxes and for irrigation district assessments were of equal rank and the Legislature found it necessary to provide some expeditious way to return to private ownership, and consequently to local tax rolls, lands covered by overlapping tax deeds. That the necessity existed is apparent for the reason that sales of tax titles would be complicated when purchasers could not be assured of a title free from liens possessed by other governmental agencies. The situation presented to the Legislature was sufficient to justify it in placing lands so covered by overlapping tax deeds in a separate legislative classification within the rule stated with supporting authorities in 5 California Jurisprudence, p. 823 et seq.

It is to the benefit of the state that property acquired by it by tax deed be sold into private ownership (*Fox v. Wright*, 152 Cal. 59, 62, 63, 91 P. 1005), and the same beneficent result would accrue to any subordinate taxing agency so acquiring title. This is, of course, true whether the land be covered by the tax deed of a single taxing agency or by overlapping tax deeds acquired by two or more independent taxing agencies. The obvious purpose of section 3897d was to permit the unification of the tax titles of two or more governmental agencies into one of such agencies, both for simplification and expedition in passing the title to private hands and to the local tax rolls, and also as security to the purchaser that he is obtaining title freed from all such outstanding tax titles. With this purpose in mind, and under the particular situation presented in connection with overlapping tax titles, the Legislature was fully warranted in passing special legislation to meet the apparent need.

[4, 5] We find no merit in the further contentions of the respondent that the title of the

act adding section 3897d to the Political Code violates section 24 of article 4 of the Constitution; that the section is uncertain in its terms; or that the proposed sales are not in accordance with the terms of the section.

Counsel for the petitioner call attention to an additional reason why no rights of redemption on the part of the former owners of the lands are disturbed, this for the reason that at the time of the agreements the title of such former owners had passed to the irrigation district by tax deeds duly executed. It is pointed out that under sections 47 and 48 of the Irrigation District Act (St. 1897, pp. 270, 271, §§ 47, 48, amended by St. 1931, pp. 440, 441) such deeds passed complete title to the district freed from any right of redemption. It is accordingly asserted with much persuasion that the former owners of the lands in question are not the owners of the land nor parties in interest therein designated by section 3780 of the Political Code as those having the right to redeem. This point, however, would but constitute an alternative ground for the determination of the matter in favor of the petitioner.

Let the peremptory writ issue as prayed.

We concur: WASTE, O. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; THOMPSON, J.



2 Cal.2d 517

METZGER et al. v. VESTAL et al.

Sac. 4849.

Supreme Court of California.

Feb. 27, 1935.

1. Husband and wife ⇨267(2)

Husband's transfer of community personality, to be voidable at suit of wife, must be shown to have been made not only without wife's written consent, but also without consideration.

2. Husband and wife ⇨267(8)

Transfer to son of stock in corporation, assets of which had constituted community property, held not voidable by wife's assignees although unsupported by consideration, in view of oral agreement that such division should be made in consideration that spouses

should transfer to corporation their community property and son should transfer his interest in partnership with father, and of wife's joinder with husband in conveyance to corporation of community property in consummation of such agreement and her signature to articles of incorporation wherein stock was distributed as previously agreed.

3. Husband and wife ⇨276(8)

Widow, sharing equally with son in residuary estate, held not entitled to one-half of corporate stock which belonged to residuary estate and constituted community property, as community survivor, and to one-half of remainder as residuary legatee, on theory that probate court had intended to distribute only decedent's one-half interest in stock, where decree of distribution referred to stock in describing residue of estate and made distribution of whole of residue to widow and son equally.

4. Executors and administrators ⇨315(6)

Decree of distribution, having become final, could not be attacked as erroneous in distributing to widow only one-half of deceased's corporate stock, whereas she was entitled to three-fourths, in so far as theory rested on error in interpreting terms of will or law applicable thereto.

5. Judgment ⇨375

Judgment can be set aside for fraud only where fraud alleged is shown to be extrinsic or collateral to matter which was tried and determined by such court, as opposed to intrinsic or direct fraud practiced in presentation of proceedings coming before court.

6. Executors and administrators ⇨315(4)

Evidence held not to show actionable fraud on widow in probate proceedings which would warrant setting aside of decree of distribution.

7. Executors and administrators ⇨315(4)

Evidence held not to warrant setting aside decree of distribution of estate because of mistake.

In Bank.

Appeal from Superior Court, Tehama County; R. M. Rankin, Judge.

Action by D. J. Metzger and another against Rolla Vestal and others. From judgment for defendants, plaintiffs appeal.

Affirmed.

Huston, Huston & Huston, of Woodland, for appellants.

W. P. Johnson, of Red Bluff, and George F. Jones, of Oroville, for respondents.

WASTE, Chief Justice.

This is an action in equity, based on alleged fraud and mistake, to have it decreed that the defendants hold certain property in trust for the plaintiffs. The court below found against the plaintiffs on the issues of fraud and mistake and gave judgment for the defendants. This appeal followed.

The record, which we have examined in detail, discloses that prior to 1896 George W. Vestal, deceased, was engaged in the butcher business in the town of Red Bluff. He and his wife, Clara Vestal, assignor of the plaintiffs herein, then owned as community property two pieces of real property and the butcher business referred to. On one parcel of this real property the butcher business was situated. The other parcel was known as the "Vestal Ranch." The year 1896 found the spouses in serious financial difficulties, their properties being heavily mortgaged and the business being operated on a nonprofit basis. There is evidence that the spouses were about to lose the properties and business. In order to alleviate this condition and in an attempt to place the business on a paying basis, the decedent prevailed upon his minor son, Rolla Vestal, one of the defendants herein, then approximately eighteen years of age, to abandon his schooling and devote his time and energy to the rehabilitation of the business. As compensation therefor he promised to give his son one-half of the business when cleared. For some time thereafter the son not only worked in the butchershops by day, but slept on the premises, and away from home, at night. When the son became of age he was taken in as a partner; the firm then being advertised as "G. W. Vestal & Son." This was entirely agreeable to plaintiffs' assignor, the wife of George W. Vestal, and mother of the boy. Within a reasonable period of time the business was again placed on a paying basis, apparently as the result of the joint efforts of father and son. In due time all debts and encumbrances were paid off and discharged. The record indicates that much credit therefor should be given to the son. At the suggestion of the parents, and after several conferences with counsel, attended by the father, mother, and son, a corporation was formed in 1904 to carry on the then steadily growing business. This corporation was known as the George Vestal Company, and to it the spouses conveyed, by ordinary grant, bargain, and sale deed, the two parcels of community real property theretofore owned by them and above referred to. As a part of the same transaction leading to the creation of the corporation and the transfer to it of

the real property of the spouses, it was agreed that George Vestal, the father, should receive 475 shares of the corporate stock, that Rolla Vestal, the son who had done much toward rebuilding the business, should receive a like number of shares, viz., 475, that Clara Vestal, the wife of George Vestal, and mother of Rolla, who with her husband had transferred their community real property to the corporation, should receive 45 shares of the corporate stock, that the defendant Ethel Gist, a daughter of George and Clara Vestal, and sister of Rolla Vestal, should receive 4 shares, and that her husband, the defendant Robert Gist, should receive 1 share of the corporate stock. The shares of the latter two were apparently only qualifying shares so that they, with the other three named shareholders, might serve as directors of the corporation. Each of the said five shareholders and directors of the corporation, including Clara Vestal, the plaintiffs' assignor, signed the articles of incorporation wherein, among other things, it is provided that each had subscribed for the number of shares, just mentioned, appearing opposite his or her name. There is evidence that certificates representing their shares were delivered to the respective shareholders, though each thereafter, apparently as a matter of precaution and security, placed the certificates in a common box. Subsequent to the formation of the corporation the business which it assumed continued its upward trend; several parcels of real property being purchased, from time to time, in the corporate name. At no time did any of the shareholders, or members of the family, voice any objection to the disposition or division made of the corporate stock. Matters so progressed until 1918, when George W. Vestal, the father, died. His will, after making several specific bequests, provided: "I give, devise and bequeath to my wife, Clara Vestal, and to my son, Rolla Vestal, in equal shares, all of the rest, residue and remainder of my property, both real and personal, of whatsoever kind or nature and wheresoever situated, including notes, mortgages, stocks, bonds, and every security, or representative of value or property." The will was duly admitted to probate. The inventory thereafter filed by the executor thereof showed that the residue of the decedent's estate consisted principally of the 475 shares of the capital stock of the George Vestal Company standing in the decedent's name from the date of incorporation of that company. Accordingly, on March 29, 1920, after expiration of the period provided for notice to creditors, a decree of distribution was entered which, after first caring for

the specific bequests of the testator, distributed the residue of the estate "in equal shares" to Clara Vestal, the surviving spouse, and Rolla Vestal, the son, mentioned with the former in the residuary clause of the will. It is to be here noted that the decree of distribution employed the identical terms of the residuary clause of the will in measuring the shares of the respective residuary legatees. The decree, in addition to specifying as part of the residue of the estate the 475 shares of stock in the George Vestal Company standing in the decedent's name, also provided: "That the whole of the residue of said estate * * * and any other property not now known or discovered, * * * be and the same is hereby distributed as follows: To Clara Vestal, surviving widow of said deceased, and Rolla Vestal, a son, the whole of the said residue in equal shares, that is to say, share and share alike." No appeal was taken from this decree. The surviving widow, though having full notice of all steps taken in the probate proceeding and having been repeatedly advised by her son Rolla to procure any necessary and independent legal advice considered advisable, at no time offered objection to any portion of the probate proceeding. On November 6, 1922, more than two years after the entry of the decree of distribution, the surviving widow assigned and sold to the plaintiffs herein her interest in the 45 shares of stock allotted to her upon the incorporation of the George Vestal Company, and also her interest in the 237½ shares of stock in the same company which came to her under the decree of distribution entered upon the probate of her deceased husband's will. Two days thereafter the widow executed an instrument which purported to assign to the plaintiffs all of her right, title, and interest, past, present, and future, in and to the estate of her deceased husband. In passing it might be noted that the 282½ shares of stock purchased by the plaintiffs from the widow were later sold by them to the defendant Schafer who subsequently sold and transferred said shares to the son Rolla. These various transfers were entered on the corporate books, and the stock certificates were adjusted accordingly.

Thereafter, and on February 9, 1923, approximately nineteen years after the creation of the corporation and the division of the corporate stock as above indicated, and approximately three years after the entry of the decree of distribution, the original complaint in this action was filed. By the second amended complaint, upon which the cause went to trial, the plaintiffs, who are strangers

to the Vestal family, seek, as assignees of the widowed mother, to assault and destroy an amicable family arrangement of many years' standing. They attempt to accomplish this result by alleging that their assignor, by means of fraud and mistake, was improperly deprived of her full share of the community property accumulated by her and her deceased husband during their joint lives. As such assignees they urge that the defendant Rolla Vestal holds in trust for them certain of such community property, represented by the corporate shares of stock. They ask that such trust be declared, and that their title to the trust property be quieted.

[1, 2] In effect, their attack is divided into two parts. As to the 475 shares of stock issued in the name of Rolla Vestal, the son, in 1904 when the corporation was formed, it is contended, in substance, that there was an improper diversion or gift of community property without the written consent of the wife, plaintiffs' assignor. There is no merit in the contention. It is elementary that for a transfer by the husband of community personal property to be voidable at the suit of the wife it must be shown to have been made not only without her written consent, but also without consideration. *Spreckels v. Spreckels*, 172 Cal. 775, 784, 158 P. 537. In view of the above-described valuable personal services rendered by the son Rolla both to the partnership predecessor and to the corporation itself, we are not satisfied that the transfer to him of 475 shares of the corporate stock was unsupported by a consideration so as to constitute a gift. However, conceding, for present purposes only, that such transfer did amount to a gift, we are of the opinion that the wife, plaintiffs' assignor, consented thereto in writing. As already pointed out, the division of the corporate stock at the inception of the corporation was in accordance with an oral agreement or undertaking among the parties that such division should be made in consideration of the spouses transferring to the corporation their community property and the son, Rolla, his interest in the business partnership then existing and for many years prior thereto operated by Rolla in conjunction with his father. When the wife, plaintiffs' assignor, joined with her husband, the decedent, in executing and delivering to the corporation a grant, bargain, and sale deed covering the community property, in consummation of such agreement, and thereafter, with the other stockholders of the newly formed corporation, appended her signature to the articles of incorporation, wherein the shares of corporate stock were

distributed as previously agreed, she must be held to have consented in writing to such disposition and division of the community property. *Spreckels v. Spreckels*, supra, page 788 of 172 Cal., 158 P. 537. The trial court's finding on this phase of the litigation is therefore amply supported. Moreover, this conduct of the wife, even if held not to amount to a joinder in writing of the assumed gift, would at the least have to be held to constitute a written ratification thereof. *Spreckels v. Spreckels*, supra, pages 785-788 of 172 Cal., 158 P. 537.

[3] We now direct our attention to the other portion of plaintiffs' attack having to do with the 475 shares of stock in the Vestal Company standing in the name of George W. Vestal, deceased, from the date of the incorporation of that company in 1904. It is urged, and the trial court found, that these shares were the community property of the spouses. In fact, they were so regarded in the inventory filed in the probate proceeding, and there now can be no question as to their community character. As to these shares it is the plaintiffs' contention that their assignor was entitled to one-half thereof as survivor of the community and to one-half of the remainder under the terms of the residuary clause of the decedent's will. In support of this claim they advance two theories. The first is that "in making the decree of distribution" the probate court had in mind distributing only the decedent's one-half interest in said 475 shares, and that a proper construction of the decree therefore entitled the wife, plaintiffs' assignor, to 75 per cent., or $356\frac{1}{4}$, of said shares and having received but 50 per cent., or $237\frac{1}{2}$, of these shares, the defendant Rolla Vestal holds 25 per cent., or $118\frac{3}{4}$, of said shares in trust. This theory is untenable. The decree of distribution in the estate of George W. Vestal, deceased, does not, as urged by plaintiffs, undertake to dispose solely of the decedent's interest in these 475 shares. This is apparent from the decree itself wherein these 475 shares are referred to in describing the residue of the estate and wherein distribution is made of the "whole of the residue of said estate" to the wife and son Rolla, "share and share alike."

[4] As their alternative theory, the plaintiffs urge that if the decree of distribution is not capable of the construction advanced by them, and we have determined that it is not, then the son Rolla Vestal must be held to have gained an unconscionable advantage through mistake in the entry of the decree. Under this theory, the decree is said to be erroneous in that it distributed to the wife only

one-half of the 475 shares standing in her deceased husband's name, whereas she was entitled to have three-fourths thereof distributed to her. In so far as this theory may rest on any error of the probate court in interpreting either the terms of the will or the law applicable thereto, it must be held to be without merit for the decree has become final and may not now be attacked on such grounds. *Cunha v. Hughes*, 122 Cal. 111, 112, 54 P. 535, 68 Am. St. Rep. 27; *Metzger v. Vestal*, 76 Cal. App. 409, 413, 244 P. 942.

[5] Plaintiffs seek to avoid this result by referring us to that line of cases wherein it is held that equity has jurisdiction, even though a decree of distribution has become final, to afford a remedy for an erroneous distribution of property or to construe a declaration of trust when it appears the decree of distribution was procured by fraud or mistake. They refer us principally to *Bacon v. Bacon*, 150 Cal. 477, 89 P. 317. We have no quarrel with the principle announced in the cases relied on by plaintiffs. In our opinion, that principle is not applicable to the present cause. Examination of the authorities discloses that:

"A judgment or decree of a court of competent jurisdiction can be set aside for fraud only where the fraud alleged is shown to be extrinsic or collateral to the matter which was tried and determined by such court, as opposed to intrinsic or direct fraud practiced in the presentation of the proceedings coming before the court. * * * As types of extrinsic fraud, the courts of appellate jurisdiction of this state have adopted the classic definition, found in *United States v. Throckmorton*, 98 U. S. 61, 65, 25 L. Ed. 93, in which the Supreme Court of the United States said: 'But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, —these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for

which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.' * * * The gravamen of the rule thus expressed lies in the fact that 'the unsuccessful party has been prevented from exhibiting fully his case.' *Bacon v. Bacon*, 150 Cal. 477, 89 P. 317, 322.

"The acts alleged to constitute intrinsic fraud must be such as operate to prevent the heir from appearing in the probate court, and thus contesting the proceedings then before the court, and exhibiting in its entirety his case against the action sought for being taken, whether it be the probate of a will, or a petition for final distribution; otherwise a court of equity is without jurisdiction to afford relief." *Abels v. Frey*, 126 Cal. App. 48, 14 P.(2d) 594, 597.

[6] The evidence and findings in the present case negative any theory of actionable fraud. Plaintiffs' assignor, as stated above, had full knowledge of all steps taken in the probate proceeding. She was advised by the defendant Rolla Vestal to procure independent legal advice pending such proceeding, and there is some evidence that she procured such advice. The findings of the trial court are full and, under the evidence, binding on these matters.

[7] Nor do we think plaintiffs have proven a case warranting the intervention of equity because of mistake. In *DeTray v. Chambers*, 112 Cal. App. 697, 699, 297 P. 575, 576, it is said that "something more is required in an action in equity to set aside a judgment which has become final, than a mere showing of mistake." In *Caldwell v. Taylor*, 218 Cal. 471, 477, 23 P.(2d) 758, 760, 88 A. L. R. 1194, and in *Clavey v. Loney*, 80 Cal. App. 20, 251 P. 232, it is declared that: "The fact that by mistake an entire interest in property was by decree of distribution distributed to one entitled to only a fractional interest therein, would not in the absence of extrinsic fraud, warrant equitable relief."

The evidence and findings herein preclude any recovery, under the authorities on the theory of actionable fraud or mistake. The case of *Bacon v. Bacon*, supra, relied on by plaintiff, is distinguishable, in that the injured party there failed to appear in the probate proceeding involved because of the actual and constructive fraud of the defendants. Such is not our case. Moreover, that case contains the following language: "If the plaintiff had been present at the hearing, contending that the will gave her \$10,000, had

presented the point to the court, and the court had thereupon read the word 'ten' as 'two,' and had made the distribution as it was made by the judgment appealed from, no doubt she would be precluded from any relief by way of equitable review, no matter how plain the mistake of the court would appear. The mistake would then be a mere error in the consideration of the evidence in a case fully presented to the court, an error of the class which human tribunals are subject to in any case, and which cannot be reviewed in equity. There would also be a complete remedy at law. The party injured would have timely notice of the error, and could pursue the usual mode of review by motion for a new trial and appeal."

In conclusion, the evidence and findings, which are amply supported, negative plaintiffs' further contention that the corporation was a mere instrument created and adopted for the purpose of carrying on the business operations of George W. Vestal, deceased, and to hold the community property of said George Vestal and his wife, the plaintiffs' assignor.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



2 Cal.2d 477

NISBET et al. v. RHINEHART.

Sac. 4389.

Supreme Court of California.

Feb. 25, 1935.

Rehearing Denied March 26, 1935.

I. Pleading ⇐18

Complaint for premiums due on policies sold to defendant by plaintiffs who failed to allege capacity in which plaintiffs brought action held sufficient as against special demurrer that complaint was unintelligible and ambiguous.

Complaint alleged that within one year last past plaintiffs sold and delivered to defendant insurance policies; that premiums thereon extended over certain period of time; that amounts, which were specified, had not been paid; and that defendant had refused to pay such amounts, which were due and payable to plaintiffs.

2. Pleading ⚡345(1)

Judgment on pleadings was properly denied where complaint stated cause of action and was invulnerable as against any of grounds specified in special demurrer thereto.

3. Trial ⚡404(1)

Findings which comport with rationality in transaction of business must prevail over obviously awkward phrase which from context of findings, as well as from subject-matter of action, cannot be true and would lead, if given effect, to absurd result.

4. Insurance ⚡84(6)

In brokers' action to recover premiums on policies issued by insurance companies to defendant at instance of brokers, finding that brokers had no contract with insurance companies which issued policies to defendant was disregarded as being inconsistent with findings that brokers secured policies from insurance companies and delivered them to defendant, and that brokers were indebted to companies for the premiums which had not been paid to companies by defendant.

5. Trial ⚡404(2)

Finding of indebtedness is not conclusion of law, but statement of ultimate fact.

6. Trial ⚡405(2)

If question is so framed as to call for answer which is conclusion and not ultimate statement of fact, other litigant should object to question and not wait to move to strike out answer if answer proves to be disappointing.

7. Appeal and error ⚡731(5)

Bill of exceptions assigning insufficiency of evidence to sustain findings of fact must specify particulars in which evidence is insufficient (Code Civ. Proc. § 648).

8. Appeal and error ⚡931(1)

Where only specification contained in bill of exceptions assigning insufficiency of evidence to sustain findings of fact was directed to question of legal conclusions in findings and ruling of court on motion to strike out statement as being opinion and conclusion of witness, it was presumed that evidence was sufficient to support judgment, in absence of showing that striking out of answer would have left findings unsupported by evidence (Code Civ. Proc. § 648).

9. Appeal and error ⚡931(1)

Where bill of exceptions, assigning insufficiency of evidence to sustain finding that brokers suing to recover premiums on policies issued by insurance companies to defendant at instance of brokers had contract with insurance companies to bring such action, contained no specification as to particulars in

which evidence was insufficient, it was presumed that evidence was sufficient to support the finding (Code Civ. Proc. § 648).

10. Insurance ⚡83(1)

Insurance broker can contract with insurance company for payment of premiums by broker on insurance negotiated by broker for benefit of insured (Pol. Code, §§ 633a to 633a4).

11. Insurance ⚡83(1)

Bond of insurance broker who collects premiums on insurance negotiated by broker for benefit of insured, and who fails to account therefor to insurance company issuing policy, is liable for amount of premiums so collected (Pol. Code, §§ 633a to 633a4).

12. Insurance ⚡188(1)

Insurance broker who effects insurance can recover premium in action in his own name, especially where insured requests broker to charge premium in insured's account with broker (Pol. Code, §§ 633a to 633a4).

13. Judgment ⚡695

Judgment in favor of insurance brokers suing to recover premiums on policies issued by insurance companies to defendant at instance of brokers would be bar to collection of premium by insurance companies, in view of presumption that evidence showed that insurance companies authorized substitution of brokers in place of defendant as to liability for payment of premiums.

In Bank.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Alfred Nisbet and another against S. W. Rhinehart, doing business as Sam's Transfer Company. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 29 P.(2d) 861.

Edward G. Benard, of San Francisco, for appellant.

Dennett & Zion, of Modesto, for respondents.

SEAWELL, Justice.

The defendant has appealed from a judgment rendered in favor of plaintiffs on account of premiums due on three insurance policies, aggregating the sum of \$353.21. The complaint alleges that said premiums accrued on three separate policies issued by three separate insurance companies, respectively. Said causes of action are identical

except as to amounts and dates and the periods covered by the policies of insurance. The complaint does not allege the capacity in which the plaintiffs brought the action, or that there was an assignment of causes of action made by said insurance companies to plaintiffs, or that plaintiffs were subrogated in place of said companies, or that plaintiffs have succeeded in any way to the rights of said insurance companies to maintain the actions. Each allegation is in form and substance as follows: "That within one year last past the said plaintiffs sold and delivered to the said defendant a policy of insurance, and that the premium on said policy of insurance extended over certain periods of time [giving dates] and that the amount is the sum of [giving amount], which sums have not been paid or any part thereof and which defendant has refused to pay and which is now due and payable from said defendant to said plaintiffs."

The prayer follows in the usual form. Defendant demurred to the complaint generally and specially, on the ground that it is uncertain, in that it could not be ascertained therefrom in what way or manner the alleged amounts became due, and also on the grounds that it was unintelligible and ambiguous for the reason that it was uncertain. The demurrer was overruled. No demurrer was placed on the ground that plaintiffs did not have legal capacity to sue. The answer was a general denial. Defendant's motion for judgment on the pleadings was denied. The appeal comes to us on a bill of exceptions.

The court found that plaintiffs were insurance brokers and as such procured the policies from the respective companies named in the complaint and delivered them to the defendant; that said companies were the insurers and the defendant was the insured; that the premiums for said insurance were payable to the respective insurers; that defendant has not paid the respective premiums; that plaintiffs had no contract of any kind or nature with said insurers; that plaintiffs had no assignment of said premiums; that plaintiffs never paid said sums or any part thereof to said insurance companies, but became and are indebted thereto for such premiums; and that the defendant never executed a promissory note payable to plaintiffs for said premiums, and never executed any writing of any kind or nature. The foregoing summary is practically a verbatim reproduction of the court's findings.

[1-4] We are of the view that the complaint states a cause of action and that it

was invulnerable as against any of the grounds specified in the special demurrer. Judgment on the pleadings was therefore properly denied. The finding of the court to the effect that plaintiffs had no contract of any kind or nature with said insurance companies which issued and delivered the policies to plaintiffs is not only contradictory of other portions of the findings, but it would absolutely defeat plaintiffs' cause of action. Its existence in the findings therefore cannot be explained on any other theory than that it was the result of inadvertence. The first few lines of paragraph I of the findings expressly find that "plaintiffs were insurance brokers; that as such brokers the plaintiffs secured a policy of automobile insurance from certain named companies and delivered said policies to the defendant; that by the terms of said policies said companies were the insurers and defendant was the insured; that by the terms of said policies the premiums for said insurance were payable to the insurers"; and that defendant had not paid the same, etc. The closing finding on this subject is: "That plaintiffs had no assignment of said premiums [from said companies]; that plaintiffs never paid said sums or any part thereof to said companies but became and are indebted thereto for such premiums. * * *"

If the policies were issued and delivered to the plaintiffs, brokers, there must have been, by force of the transaction, an express or implied contract or agreement or understanding of some kind between the insurance companies and said brokers as to the payment by some one of said premiums. Otherwise the whole transaction would reduce itself to an absurdity. Therefore, the findings which comport with rationality in the transaction of business must prevail over an obviously awkward phrase which from the context of the findings, as well as from the subject-matter of the action, cannot be true and would lead, if given effect, to an absurd result. Such a result in the instant case may be avoided by disregarding the phrase, which cannot possibly be accepted as a true statement of fact from the nature of the transaction out of which it arises.

[5-8] The appeal is taken upon a very scant bill of exceptions. Appellant assigns as error the insufficiency of the evidence to justify the finding that "plaintiffs became indebted to the insurance companies for the payment of such premiums, and which is set forth as follows: 'but became and is indebted thereto for such premiums.'" No attempt is made to point out in the bill of exceptions

the particular in which the evidence was insufficient to sustain the finding of indebtedness. The assignment seems to be directed to the point that they are conclusions of law. A finding of indebtedness is not a conclusion of law, but the statement of an ultimate fact.

Appellant further specifies as error the refusal of the court to strike from the record an answer given or statement made by a witness called by the plaintiffs in reference to a question which is not embraced in the bill of exceptions. Said answer sought to be stricken out is as follows: "That plaintiffs were liable to the insurance companies for such premiums." It does not appear that said question was objected to by appellant. All the information which the bill of exceptions imparts is that appellant moved to strike the answer or statement out as being a conclusion of the witness, which motion was denied. The question which was not objected to may have been so framed as to have called for the answer given. In other words, the question may have included the very language which appellant here contends is a conclusion and not the statement of an ultimate fact. If so, it was the duty of appellant to have objected to the question rather than to await the answer and then move to strike it out if it proved to be disappointing.

While the bill of exceptions assigns in general terms the insufficiency of the evidence to sustain the findings of fact, there is no specification as required by section 648, Code of Civil Procedure, pointing out the particulars in which any of the evidence is insufficient. This is essential. *Coglan v. Beard*, 67 Cal. 303, 7 P. 738; *Parker v. Reay*, 76 Cal. 103, 18 P. 124. No assignment is made that there is no evidence supporting the findings and judgment, but the assignment goes to the insufficiency of the evidence. The only specification contained in the bill of exceptions seems directed to the question of legal conclusions in the findings and the ruling of the court upon the motion to strike out the answer or statement of said witness on the ground that it was the opinion and conclusion of the witness. No claim is made that this specification affects the question of sufficiency of the evidence. There is nothing before us to suggest that had the court stricken out said answer it would have left the findings unsupported by the evidence. There may have remained in the record ample evidence to support the findings and judgment even had the court ruled with appellant's contention. All that is inferable from

appellant's assignment is that the court committed an error of law in its ruling on a matter of evidence which does not appear to bear any relevancy to the question of the sufficiency of the evidence to support the findings and judgment. The particular specification not having been assigned as affecting the sufficiency of the evidence, and none other being so assigned, it must be presumed that the evidence supports the judgment. If it be conceded that the court erred in refusing to strike out the matter which appellant claims to have been the conclusion of the witness, the error, if such it be, may have been fully covered by other evidence on the subject to which no valid objection could be placed. What has been here said is not to be taken as conflicting in any way with the rule that where a bill of exceptions is settled it will be presumed that it contains all the evidence necessary to explain the points specified. *Abbey Homestead Ass'n v. Willard*, 48 Cal. 614; *Couson v. Wilson*, 2 Cal. App. 181, 83 P. 262; *Wilson v. Atkinson*, 68 Cal. 590, 10 P. 203; *Hidden v. Jordan*, 28 Cal. 301, 302. "There is no presumption, as appellant insists, that a bill of exceptions embraces all of the evidence in the case, but only so much thereof as is material to the exceptions assigned. [Citing authority.] In the absence of such specification and of the evidence in the case, the appellant's contention in this regard is not available to him upon this appeal." *Estate of Randall*, 188 Cal. 329, 205 P. 118, 121.

[9-13] There being no assignment that the ruling on the question of law above excepted to had anything to do with the sufficiency of the evidence supporting the contract or agreement existing between the insurance companies and plaintiffs, it will be presumed that plaintiffs were authorized by contract or agreement to bring said actions, and that there is evidence supporting such a finding. That a broker may contract with an insurance company for the payment of premiums by himself on insurance negotiated by the broker for the benefit of the insured cannot be questioned. In fact, such transactions between the insurance companies and brokers are contemplated by sections 633a to 633a4, Political Code, and in cases where the broker collects the premium and fails to account for it to the insurance company which issued the policy, his bond is liable for the amount so collected. In the conduct of the business there can be no doubt as to agreements being frequently made between brokers and the insurance companies as to the assumption of the payment of premiums un-

der some circumstances by the brokers. A broker who effects insurance may recover the premium in an action in his own name, especially where the insured requested him to charge the premium in his account with the insured. 33 C. J. 68. "If the agent of an insurance company, upon his individual responsibility, extends credit for the premium to the assured, and pays the amount to or is charged with it by the company, such payment inures to the benefit of the assured and consummates the contract. * * * The agent may sue for and recover the amount in his own name." 16 Am. & Eng. Ency. of Law, pp. 859, 860; Cooley's Briefs on Insurance (2d Ed.) vol. 2, p. 1512. In the instant case, we have the dual situation of the broker becoming obligated to the insurance company for the payment of the premiums and the assured agreeing with the broker to pay him the premiums on the policies which he procured for him and which he would not have obtained but for the broker's services. Judgment in the instant case would be a bar to the collection of the premium by the insurance company, inasmuch as it will be presumed that the evidence adduced at the trial shows that the insurance companies authorized the substitution of the plaintiffs in place of the assured as to liability for the payment of said premiums.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.



2 Cal.2d 590

PARK et al. v. POWERS et al.

Sac. 4869.

Supreme Court of California.

Feb. 28, 1935.

1. Adverse possession ⇨89

To acquire title by adverse possession, payment of taxes is essential (Code Civ. Proc. § 325).

2. Adverse possession ⇨43(1)

Where possession of adverse claimant constitutes continuation of occupation by other members of claimant's family, character of claimant's possession must be determined

with reference to circumstances under which family's occupancy began and continued.

3. Adverse possession ⇨44

Where inclosed land suitable for grazing and pasturage is occupied each year during entire season therefor, as from May until late October or November, possession is "continuous" within adverse possession statute (Code Civ. Proc. § 325).

[Ed. Note.—For other definitions of "Continuous Possession," see Words & Phrases.]

4. Adverse possession ⇨11

Title by adverse possession may be acquired, though possession or use commenced under mistake.

5. Adverse possession ⇨85(2)

In suit to quiet title based on adverse possession, evidence of conveyance held admissible, although not recorded until long after date thereof; it appearing that possession was otherwise open and notorious.

6. Adverse possession ⇨85(3)

Changes in description of land claimed by adverse possession held insufficient under evidence to indicate lack of claimant's "good faith," in sense of belief in ownership; good faith being consistent with ignorance of rules of property law.

7. Adverse possession ⇨18

Claimant of land by adverse possession need not reside thereon. (Code Civ. Proc. §§ 325, 412).

8. Quieting title ⇨27

Actions relating to land, such as suits to quiet title, are called "quasi in rem," their distinguishing characteristic being that, although not strictly "in rem," since judgments therein are not binding on world, but conclusive only between parties and their privies, such actions differ from actions purely in personam, inasmuch as jurisdiction against absent nonresident defendant may be had on constructive service (Code Civ. Proc. § 412).

[Ed. Note.—For other definitions of "In Rem" and "Quasi in Rem," see Words & Phrases.]

9. Quieting title ⇨52

In action to quiet title, plaintiff may be put into possession through writ of possession.

10. Boundaries ⇨48(3)

Where both landowners exchanging properties participated in negotiations with surveyor employed to survey properties and mark line of boundary fence, fence built along line marked by surveyor and acquiesced in for almost 20 years held to constitute es-

tablished boundary, even though both land-owners intended fence line to conform with boundary line fixed by deeds and erroneously believed that such lines did conform, and even though line of deeds could be determined by survey.

In Bank.

Appeal from Superior Court, El Dorado County; Geo. H. Thompson, Judge.

Action by D. W. Park and others against Sabra E. Powers and Katherine S. Hill, individually and as executrix of the estate of Arthur M. Hill, deceased. From a judgment for plaintiff, defendants take separate appeals.

Affirmed.

John G. Jury, of San Francisco, for appellants.

Geo. L. Sanford, of Carson City, Nev., and Henry S. Lyon, of Placerville, for respondents.

SEAWELL, Justice.

From a judgment quieting plaintiffs' title to lands in Eldorado county, defendants Sabra E. Powers and Katherine S. Hill prosecute separate appeals. Said land is situate on the shore of Lake Tahoe, and is a portion of lot 2, in the northwest quarter of section 27, township 13 north, range 18 east, Mount Diablo base and meridian. It comprises approximately the southeast quarter of the northwest quarter of section 27. Said northwest quarter of section 27 has no southwest or northwest quarter, but the southeast quarter thereof, that is, lot 2, is bounded by Lake Tahoe. The present California-Nevada boundary line passes diagonally across lot 2 in a straight line from a point on the western line of the lot, near the northwest corner thereof, to the southeast corner, at or near the intersection of the midsection lines of section 27. This action involves that part of said lot 2 which is situate in this state. The lot contains approximately 42.25 acres, of which 16.64 are in California. In recent years it has become valuable for summer camp sites and residences.

Plaintiffs rely on title by adverse possession. Plaintiffs Conklin and Fuller are grantees of plaintiff D. W. Park as to 4.58 acres in lot 2 by deed executed in 1928. Defendant Katherine S. Hill is the surviving wife, and executrix of the estate, of Arthur M. Hill. In 1911 members of the Park family conveyed to the Hills 3.45 acres, more or less, in lot 2, bounded by the south line of said lot. Appellant Hill contends that a fence placed upon lot 2 in 1910 and 1911 is in fact south of

the northern line of the 3.45-acre grant and encroaches upon it. Defendant Sabra E. Powers claims record title to all of lot 2, but consents that title be quieted in appellant Hill as to said 3.45 acres, which the Hills acquired in good faith.

Appellant Sabra E. Powers prays that this court direct entry of a judgment quieting her title. Upon the record, there is a question as to whether she has established her record title to all of lot 2. In 1864, said lot and other lands in section 27 were patented to her husband, Phineas F. Powers, by the United States government. In 1931 said lot was set aside to appellant by decree in her husband's estate. However, on October 5, 1869, she and her husband joined in conveying lands in section 27 to Thomas O'Brien, who six days later, on October 11, 1869, executed a deed naming the husband as grantee. It is the theory of appellant, as stated in her briefs, that the deed of October 11 was a reconveyance to her husband of lands in lot 2 previously conveyed to O'Brien by the deed of October 5, and that thereafter her husband continued to be the owner until his death.

Said deed of October 11, through which appellant claims, contains no reference to lot 2, or indeed to any lands in the northwest quarter. It purports to convey the "south fraction of the south half of the northeast quarter and the northeast quarter of the southeast quarter of section 27." It does, however, describe the lands conveyed as bounded on the west by Lake Bigler (now Lake Tahoe), and as containing 90 acres, more or less, by reason of which recitals, appellant contends, it conveys an interest in lot 2 in the northwest quarter. Lands in the northeast and southeast quarter do not border on the lake. It would be indulging in great liberality to admit parol evidence of an intent to transfer lot 2 in the northwest quarter when the deed contains no reference thereto, and the description is not aided by words of ownership or user. We are not disposed at this time to analyze the law pertaining to construction of uncertain descriptions, for, if it be conceded here, for purposes of argument, that the deed may be explained as contended for, and that upon the record an intent to transfer lot 2 is established, nevertheless appellant has lost title to said lot through adverse possession of plaintiffs.

On November 28, 1883, Phineas F. Powers conveyed to C. P. Powers lands in sections 27 and 23. The lands in section 27 are described as "the south fraction of the south half of the northeast quarter and the northeast quarter

of the southeast quarter of section 27." This is precisely the description contained in the deed of 1869 from O'Brien to Powers, except that the deed of 1883 omits the recital that the land conveyed is bounded on the west by the lake, and that it contains 90 acres, more or less. In 1888 Wales Averill purchased lands in section 27 from the estate of C. P. Powers by the description contained in the 1883 deed, and also lands in section 23. In 1899 said lands, together with other lands, passed by deed from the Averill family to D. B. Park, father of plaintiff D. W. Park. On February 15, 1908, D. B. Park deeded to his wife and children. He died in the same year. In 1915 several conveyances were made between members of the Park family, all following the description of the 1883 and 1899 deed, which did not include lot 2. Upon the death of Bruce Park, his brother D. W. Park was appointed administrator of his estate, and an undivided two-thirds interest in lands in section 27 and other lands was distributed to Unity Park, mother of Bruce Park, in 1922. She already claimed an undivided one-third interest under the family conveyances aforementioned. The description in the decree is by metes and bounds and includes lot 2. On October 25, 1924, Unity Park conveyed to D. W. Park land in section 27, including "lot 2 of section 27."

[1, 2] Since the deed of 1883 and later deeds with the same description did not include lot 2, they did not confer color of title on the grantees named, but adverse possession of said lot is governed by section 325, Code of Civil Procedure. Until 1923 the possession of the Park family lacked one of the essential elements to ripen into title by adverse possession—payment of taxes. As this action was not filed until January 21, 1931, adverse possession, including payment of taxes, dating from 1923, is sufficient to establish title in plaintiffs. However, the facts pertaining to the prior occupation and possession are material, as the possession of plaintiff D. W. Park is a continuation of the occupation by other members of his family, and the character of his possession must be determined with reference to the circumstances under which the occupancy of his family began and was perpetuated. *Akley v. Bassett*, 189 Cal. 625, 643, 209 P. 576.

As noted above, lands in section 27 and a large acreage of other lands passed from the Averill family to D. B. Park by deed of May 31, 1899. The lands in section 27 were described as in the earlier deed of 1883, which did not include lot 2. Coincident with the de-

livery of the deed, the grantor delivered to Park a map entitled "Edgewood Ranch, Wales Averill." Said map, a photostatic copy of which was introduced herein, was shaded to delineate the Averill or Edgewood ranch. The land which constituted lot 2 of section 27, bordering on Lake Tahoe, is shaded as a part of said ranch. At that time a fence, made of brush and timber, inclosed the lands marked as Edgewood Ranch, and the grantor represented that the lands within said inclosure, which in fact included lot 2, were conveyed by the deed. Although section lines and mid-section lines are drawn upon the map, there are no numbers or letters from which the designation of any particular quarter section can be ascertained, nor does the designation "Lot 2" appear.

[3] In 1899 there was a house upon the ranch, not situate, however, on lot 2. The Averills moved out upon delivery of the deed to D. B. Park, and since then members of the Park family have been in possession continuously of the Edgewood, Lake, or Averill ranch, claiming ownership thereof. It has been used each year for pasturage and grazing, for which land in the district was adapted and customarily used. With the exception of one or two wet years, it has been irrigated. The old brush and timber fence was repaired and rebuilt until 1910, or 1911, when it was replaced by a new fence with posts and wire. Where inclosed land suitable for grazing and pasturage is occupied each year during the full period of the season therefor, in the instant case from May until late October or November, possession is continuous within the meaning of the statute. *Montgomery v. Quimby*, 164 Cal. 250, 128 P. 402; 1 Cal. Jur. 533, and cases there cited.

The only reasonable inference to be drawn from the evidence is that D. B. Park entered upon lot 2 under the mistaken impression that the deed to him for adjoining lands in fact transferred lot 2, and that he, and after him members of his family, claimed to own said lot. The fact that D. B. Park's entry was coincident with the deed of 1899 would not preclude him and thereafter members of his family from occupying adversely adjoining lands not embraced in the deed.

[4] Title by adverse possession may be acquired though the possession or use commenced under mistake. *Woodward v. Faris*, 109 Cal. 12, 41 P. 781; *McCormack v. Silsby*, 82 Cal. 72, 22 P. 874; *Wagner v. Meinzer*, 38 Cal. App. 670, 177 P. 293; 1 Cal. Jur. 577; note, 80 A. L. R. 156. In *Woodward v. Faris*,

109 Cal. 12, at page 17, 41 P. 781, 782, Mr. Justice Temple said: "Most cases of adverse possession which have ripened into title commenced, I doubt not, in mistake. It must be either by mistake or deliberate wrong. It is through mistake only that one can honestly claim to own that which really belongs to another." Appellant Powers rests her claim of legal title to at least a part of lot 2 on the premise that it was the intention of Powers and O'Brien that it should be transferred by the O'Brien-Powers deed of October 11, 1869. If they believed that land bounded by the lake and including lot 2 was correctly described as "the south fraction of the south half of the northeast quarter and the northeast quarter of the southeast quarter of section 27," it is a likely inference, especially in view of the fact that said lot, so far as the evidence shows, was never occupied except as part of the larger tract, that, when the same description was used in the deed of 1883 by Powers, and by later grantors, without the recital that the property was bounded by the lake and contained 90 acres, more or less, all concerned, including appellant Sabra E. Powers, believed that an interest in lot 2 was thereby conveyed. Although her husband died in 1910, appellant Powers did not procure lot 2 to be set aside to her until 1931.

[5] In the circumstances, the failure of the Parks to pay taxes before 1923 does not demonstrate that they did not occupy under claim of title, but is consistent with a belief that the lands described in the deed of 1899, upon which they no doubt paid taxes, included the physical property, which in fact, although unknown to them, was correctly described as lot 2. Some uncertainty may also have arisen by reason of the location of the land with reference to the state line. The present line was adopted by California in 1901 and by Nevada in 1903. The earlier boundary ran south of the land in question. The failure to record the interfamily Park deeds of 1908 and 1915 may also have been due to uncertainty as to the location upon the ground, and with reference to the Edgewood ranch, of the state line. The larger part of lot 2, and of said ranch, is in Nevada. The conveyance of 3.45 acres to the Hills in 1911 and the building of the new fence about that time were also the exercise of dominion over lot 2. Although this conveyance was not recorded until 1928, evidence thereof was admissible; it appearing that the possession was otherwise open and notorious.

We have discussed at some length the occupancy of the Park family prior to the pay-

ment of taxes in 1923 because the circumstances of D. W. Park's occupation must be viewed in the light of the prior possession. After the deed to him, occupancy continued as before, and was accompanied by payment of taxes. In 1928 he granted 4.58 acres to plaintiffs Conklin and Fuller, and in 1930 he procured a decree in Nevada quieting his title as to the section of the lot in Nevada.

[6] But appellant Powers contends that, because lot 2 was described by metes and bounds in the estate of Bruce Park, of which plaintiff was administrator, and as lot 2 of section 27 in the deed to him in 1924, it conclusively appears that he had discovered the omission in the earlier description, and knew that he did not have title. Considerable confusion appears to have arisen as to whether good faith, in the sense of a belief in ownership, is essential to acquire title by adverse possession. The decisions of this state are to the effect that one who claims *constructive* adverse possession of land not actually occupied, but part of a larger tract described in an instrument of title, a part of which has been occupied, must in good faith rely on said instrument. See discussion and citations, 1 Cal. Jur. 575. But many text-writers declare that as to *actual* adverse possession, *bona fides*, in the sense of belief in ownership, is not a requisite; that "claim of title" or right is a claim by the occupant to appropriate, an intention to hold for himself. 1 R. C. L. 709; 2 C. J. 199; Sedgwick and Wait, Trial of Title to Land, pp. 614-619; 2 Tiffany, Real Property, p. 1936, § 504; 7 Cal. Law Rev. 200. We will not here resolve any confusion existing in this state, for the reason that the changes in description do not indicate a lack of *bona fides*. Park may, nevertheless, have believed that, by virtue of the long occupation of his family, the uncertainty as to the record title under the description in the O'Brien-Powers deed, and the probability, mentioned before, that Phineas F. Powers and later grantors all intended that lot 2 should be transferred, in fact he had acquired a good title, although not, perhaps, record title. Good faith is consistent with an ignorance of rules of property law. Wilson v. Atkinson, 77 Cal. 485, 20 P. 66, 11 Am. St. Rep. 299.

[7-9] The possession of the Parks was not deprived of its adverse character because neither they nor any agent for them ever resided or lived upon lot 2. There was a house upon the ranch which was located on the Nevada side. Members of the Park family lived in this house during part of the time, but their family home and legal residence was located

about twelve miles distant, in Nevada. The adverse claimant need not reside upon the land. *Webber v. Clarke*, 74 Cal. 11, 15 P. 431; 1 Cal. Jur. 529; 2 C. J. 57. Under section 412, Code of Civil Procedure, the owner of land may have substituted service by publication and mailing upon a nonresident adverse claimant. Actions relating to land, such as suits to quiet title, are denominated quasi in rem. Their distinguishing characteristic is that, although not strictly in rem, since judgments therein are not binding upon the world, but conclusive only between the parties and their privies, they differ from actions purely in personam, in that jurisdiction against a nonresident and absent defendant may be had upon constructive service. *Perkins v. Wakeham*, 86 Cal. 580, 25 P. 51, 21 Am. St. Rep. 67; *First Nat. Bank v. Eastman*, 144 Cal. 487, 77 P. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; *McDonald v. McCoy*, 121 Cal. 55, 69, 53 P. 421; *Title, etc., Restoration Co. v. Kerri-gan*, 150 Cal. 289, 88 P. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; note, 51 A. L. R. 754; 1 *Freeman on Judgments*, p. 705; 3 *Freeman on Judgments*, p. 3122; 22 Cal. Jur. 139; 21 Cal. Jur. 497-500. In actions to quiet title, the plaintiff may be put into possession through writ of possession. 22 Cal. Jur. 129, 194. In *Akley v. Bassett*, 189 Cal. 625, 645, 209 P. 576, it is expressly held that, by virtue of provisions for substituted service, title by prescription may be acquired by a nonresident claimant of land.

[10] The separate appeal of Katherine S. Hill presents the question whether the fence built in 1910 and 1911 constituted the northern boundary of the 3.45-acre triangular tract in the southern part of lot 2 which was conveyed to the Hills in 1911. In exchange for this parcel, the Hills conveyed to the Parks a triangular piece of about the same area in the northern part of the southeast quarter of section 27. One Hawkins was employed in 1910 to survey the parcels to be transferred, furnish a description, and mark the line of the boundary fence to be built. Park and Hill both participated in the negotiations with the surveyor. The fence was built along the line marked by the surveyor with flags, which is slightly to the south of the line called for by the deeds. The Park deed to the Hills is dated August 10, 1911, the Hill deed, March 21, 1913. It may well be that neither deed was prepared until after the fence had been placed along the line agreed upon by the parties as a boundary. That the fence constituted an established

boundary is fully supported by the following cases: *Moniz v. Peterman*, 220 Cal. 429, 31 P. (2d) 353; *Vowinkel v. N. Clark & Sons*, 217 Cal. 258, 18 P. (2d) 58; *Nusbickel v. Stevens*, 187 Cal. 15, 200 P. 651; *Silva v. Azevedo*, 178 Cal. 495, 173 P. 929; See, also, *Wiel, Built-up Boundaries*, 4 Cal. Law Rev. p. 293. This line was acquiesced in for almost twenty years. The establishment of a boundary marked by the fence is not prevented because both parties intended that the fence line and boundary fixed by the deeds should conform, and believed that the fence was upon the line fixed by the deed, nor by the circumstance that the line of the deeds could be determined by a survey. Cases cited, *supra*, this paragraph.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; CURTIS, J.



5 Cal.App.2d 80

O. V. TROMPETER & CO. v. SUPERIOR
COURT IN AND FOR LOS ANGELES
COUNTY et al.

Civ. 10036.

District Court of Appeal, Second District,
Division 2, California.

March 2, 1935.

Mandamus ☞51

Writ of mandate to compel trial court to render judgment, on ground that moratorium law under which judge, in action to foreclose special assessment bond, found for petitioner but refused to sign judgment, was denied, where at time of petition moratorium law had been superseded by a different moratorium act (St. 1934, Ex. Sess., c. 5; St. 1935, Assembly Bill No. 75, Feb. 1, 1935).

Petition by O. V. Trompeter & Co. for writ of mandate against the Superior Court in and for Los Angeles County and Thomas C. Gould, Judge thereof.

Petition denied.

John F. Bender and Robert E. Rosskopf, both of Los Angeles, for petitioner.

Everett W. Mattoon, J. F. Moroney, and Harold W. Kennedy, all of Los Angeles, for respondents.

Ray L. Chesebro, F. von Schrader, and William H. Neal, all of Los Angeles, *amici curiæ* for respondents.

STEPHENS, Presiding Justice.

Petitioner brought suit in respondent court to foreclose a special assessment bond. The case was tried and the trial court decided in favor of petitioner, but declined to sign the judgment because a moratorium law (Assembly Bill No. 13, Extra Session of Legislature, 1934, c. 5) had in the meantime become effective and would remain effective until February 28, 1935. Petitioner requests this court to direct the trial court to render judgment, contending that the moratorium act is unconstitutional.

Such moratorium law has been superseded by another and different moratorium act (Assembly Bill No. 75, Session of Legislature, 1935, approved and effective February 1, 1935). Further proceedings herein would be futile.

The petition is denied.

We concur: CRAIL, J.; SCOTT, Justice pro tem.



5 Cal.App.2d 13

BENNETT v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 9711.

District Court of Appeal, Second District,
Division 2, California.

Feb. 27, 1935.

Hearing Denied by Supreme Court
April 26, 1935.

Constitutional law ☞ 156

Statute, limiting amount of deficiency judgment after sale of realty under trust deed to difference between entire indebtedness to beneficiary and fair market value of property at time of sale, held unconstitutional as impairing obligation of contracts, as applied to transaction wherein sale was made and right of beneficiary to be repaid entire amount of indebtedness had accrued before statute became effective (Code Civ. Proc. § 580a, as added by St. 1933, p. 1672, § 4; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

deceased, and individually, for a writ of mandate to the Superior Court of Los Angeles County and Thomas C. Gould, judge thereof, to compel respondent court to appoint an appraiser of real property under Code of Civil Procedure, § 580a.

Writ denied.

T. Frank Courtney, of Los Angeles, for petitioner.

Farrand & Slosson and Loren A. Butts, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

Petitioner seeks a writ of mandate requiring respondent court to appoint an appraiser of certain real property under section 580a, Code of Civil Procedure (Stats. 1933, pp. 1669, 1672, § 4), in case No. 361348, entitled *Security First National Bank v. Bennett*, on file in said court, which is a suit to recover a deficiency judgment against the estate of which petitioner is executrix, following sale of such real property under a trust deed. The sale was made before the effective date of the section cited. Plaintiff bank, after selling the property, brought suit to recover deficiency judgment, and respondent court declined to appoint an appraiser under the provisions of the Code section cited, before proceeding with trial of the case.

The statute undertakes to limit the recovery against the judgment debtor in such a case to the difference between the entire amount of the indebtedness and the fair market value at the time of sale, as determined by the court from evidence including a report by an inheritance tax appraiser appointed ten days before trial to make such appraisal, rather than to permit recovery by the creditor of the difference between the entire amount of the indebtedness and the actual sale price.

The substantive right of the beneficiary under the trust deed to be repaid the entire amount of the indebtedness had accrued before the section cited became effective, and the regulation which it contemplates could not be construed as having entered into the dealings between the parties when the contract was made. The operation of the statute in the circumstances is far more than procedural.

The statute attempts to so affect the contract that only a portion of the indebtedness may be recovered notwithstanding the borrower of the money may well be able to pay in full. This certainly impairs the obligation

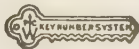
Application by Manerva D. Bennett, as executrix of the estate of William H. Bennett,

of contracts. Article 1, § 16, Const. of California; art. 1, § 10, Const. of United States.

The petitioner is not assisted by the doctrine so ably expounded in *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, wherein the payment was deferred and not nullified. The following quotation from *Worthen Co. v. Thomas*, 292 U. S. 426, 54 S. Ct. 816, 818, 78 L. Ed. 1344, 93 A. L. R. 173, decided since the *Blaisdell* Case, more nearly applies to the instant situation: " * * * This essential reserved power of the State [the police power] must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." See, also, *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143; *McCracken v. Hayward*, 2 How. 608, 11 L. Ed. 397; *Howard v. Bugbee*, 24 How. 461, 16 L. Ed. 753.

The writ is denied.

We concur: CRAIL, J.; SCOTT, Justice pro tem.



5 Cal.App.2d 89

SQUILLANTE v. CALIFORNIA LANDS,
Inc.
Civ. 1317.

District Court of Appeal, Fourth District,
California.
March 4, 1935.

Sales ⇐ 172

Grower, contracting to deliver designated quality of specific variety of grapes to be grown in specific vineyards, held not liable for failure to deliver part of grapes due to extraordinary heat conditions affecting vineyards, so that they did not produce sufficient grapes of variety and quality named.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Suit by Vincent J. Squillante against California Lands, Inc. From a judgment for defendant, plaintiff appeals.

Affirmed.

Barbour, Kellas & Backlund and Edward L. Kellas, all of Fresno, for appellant.

Farnsworth, Burke & Maddox, of Visalia, for respondent.

ALLYN, Justice pro tem.

Plaintiff brought suit for damages for breach of contract to buy 10 carloads of Zinfandel grapes "of good quality and color and of good sugar content" from the defendant. The agreement was made through an exchange of telegrams after the plaintiff had inspected defendant's vineyards and arranged that the grapes be packed by a certain packer and under defendant's brand. Five cars were delivered and then, due to heat damage, defendant was unable to harvest or ship any further grapes of the quality agreed upon. Plaintiff was so notified, and in due course this action was brought and judgment given for the defendant. The defendant was a grower and not a dealer in grapes, except in so far as was necessary to dispose of its own products.

Upon this appeal plaintiff submits that defendant was not relieved from its obligation to deliver the grapes by the crop losses caused by adverse weather conditions, and hence that it was error to admit evidence on this issue. It is argued that the contract was a general undertaking to sell grapes of a given quality which the seller was to have ready at all events when delivery was due. This might well be true if the defendant were in the general business of packing and selling grapes (*Eskew v. California Fruit Exchange*, 203 Cal. 257, 263 P. 804), but it is apparent here that the parties intended the sale and purchase of 10 cars of grapes of a particular quality to be grown and produced in the vineyards of the defendant, to be packed by a named packer under the defendant's established brand which was used by it in marketing its own products. The sale being of a designated quality of a specific variety of grapes growing or to be grown in specific vineyards, and these vineyards being so far affected by extraordinary heat conditions that they did not produce sufficient grapes of the variety and quality named to comply with the contract, the defendant could be compelled to perform the contract only so far as it was possible for it so to do. It could not be compelled to perform impossibilities, nor was it liable in damages for a failure to comply with its contract resulting from vis major not attributable to any fault on its part. Ontario Deciduous Fruit Growers' Associa-

tion v. Cutting Fruit Packing Co., 134 Cal. 21, 66 P. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231; Operators' Oil Co. v. Barbre (C. C. A.) 65 F.(2d) 857, 861.

The finding of the trial court on this issue is conclusive, and is sufficient to sustain the judgment for the defendant. It is therefore unnecessary to review the questions raised as to the measure and proof of damages. They have been considered and found insufficient to justify a reversal.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.



**CALISTOGA NAT. BANK v. CALISTOGA
VINEYARD CO., Limited, et al. ***
Civ. 5210.

District Court of Appeal, Third District,
California.

March 6, 1935.

Rehearing Granted April 5, 1935.

1. Banks and banking ⇨227(3)

Evidence in bank's action on depositors' note *held* sufficient to support court's finding that plaintiff did not agree to credit defendants with amount of forged checks, paid by bank and charged against defendants' account, or to consider question of forgery when defendants should tender payment of balance due on note.

2. Appeal and error ⇨1058(2)

Exclusion of one defendant's testimony in bank's action on depositors' note as to whether witness wrote and signed alleged forged checks, paid by bank from defendants' account, *held* harmless to defendants, where same witness subsequently testified that checks were forged by another; defendants not being precluded thereby from proving plaintiff's agreement to credit amount of such checks on note, thereby causing defendants to forbear commencement of action against bank for such amount within statutory time (Code Civ. Proc. § 340, subd. 3).

3. Appeal and error ⇨1056(4)

Exclusion of one defendant's testimony in bank's action on depositors' note as to whether witness filed any action for amount of forged checks, paid by bank from defendants' account, before institution of bank's suit, *held* harmless to defendants, where court

determined that plaintiff did not agree to credit such amount on note.

4. Banks and banking ⇨154(2)

Defendants in bank's action on depositors' note *held* not entitled to set off amount of forged checks, paid by bank from their account, where they failed to institute action against bank for such amount within statutory limitation period after learning of forgeries, in absence of showing that bank agreed to credit amount on note (Code Civ. Proc. § 340, subd. 3).

Appeal from Superior Court, Napa County;
Forrest A. Plant, Judge.

Action by the Calistoga National Bank against the Calistoga Vineyard Company, Limited, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

King & King, of Napa, for appellants.

Clarence N. Riggins, of Napa, for respondent.

THOMPSON, Justice.

The defendants have appealed from a judgment which was rendered against them in a suit on a promissory note. It is claimed the court erred in refusing to allow the defendants a credit on the note in the amount of \$850, which is the aggregate sum of seven alleged forged checks which were paid by the bank and charged against the defendants' account therein. The court found that the seven questioned checks were forged, and that they were charged against the account of the defendants, but held that an action against the bank, on that account, was barred by the provisions of section 340, subd. 3, of the Code of Civil Procedure.

The plaintiff is a corporation doing a banking business in Napa county, with its principal place of business at Calistoga. For several years prior to the commencement of this action the defendants, Bianchi and Forni, were engaged as an association in operating a vineyard business in Napa county under the name of Calistoga Vineyard Company, Limited. The evidence indicates that on December 29, 1930, after paying the seven forged checks which are in dispute, the account of the defendants with the plaintiff bank showed a credit of \$3,481.55. The bank then held the defendants' promissory note, dated March 24, 1930, for \$4,000, payable on demand, upon which there remained unpaid the sum of \$1.

200 and interest at the rate of 7 per cent. per annum from December 8, 1932. February 8, 1932, the bank notified the defendants in writing that there was due on their note the sum of \$1,500 and accumulated interest, and requested their prompt payment thereof. March 2, 1932, the bank again notified the defendants that there was still due on the note the sum of \$1,500 and accumulated interest, and once more requested their prompt payment of the same. Subsequently the bank charged the defendants' account with the sum of \$300 and the accrued interest on the note, crediting the promissory note with that amount. April 25, 1932, the bank notified the defendants to that effect, again urging the prompt payment of the balance due on the note. The defendants received monthly statements of their account from the bank. December 19, 1930, they received a statement showing a balance to their credit of the sum of \$5,360.54. The statement contained a list of thirty-four checks which had been paid and charged to the account during the preceding month. The defendants received another statement of their account on December 31, 1930. It showed a balance of \$9,883.66 to their credit. Eighty checks were listed in the last-mentioned statement and charged to their account. The following month another statement was received showing a balance of \$3,481.55 to the defendants' credit after charging their account with the payment of thirteen checks. These three statements were introduced in evidence. The bank statements of November and December, 1930, contained seven checks aggregating the sum of \$850, which the defendants discovered, within a few days thereafter, were forged and cashed from their account by their clerk Bower. The bank was promptly notified of the payment of these forged checks. The defendant Forni testified that he was the only member of the firm authorized to draw checks against their association account; that their stubs contained no evidence of the drawing of these seven checks and that he did not draw them, but that they had been forged. Mr. Harold Bower, who was an accountant in the office of the California Vineyard Company in 1930, testified that he withdrew in the latter months of that year from the defendants' account in the bank the sum of \$850 without authorization therefor; that this sum was procured by means of several checks ranging in amount from \$75 to \$200 each. He admitted that he had been previously charged with "forgery and peculations." He testified that these seven checks were paid to him at the bank; that they were

drawn in the name of the Calistoga Vineyard Company, by either Forni or Bianchi, but he refused to say that he forged or signed their names to the checks. He said in that regard: "I refuse to state under oath whether C. B. Forni actually signed those checks or whether I forged his name on them." Bower was discharged from his employment with the defendants January 5, 1931. Mr. Forni testified that he became aware of the forgeries January 3, 1931. On the following Monday Forni went to the bank and talked with Mr. Westover, the vice president and cashier thereof, about the payment of the forged checks. This defendant testified that Mr. Westover then said "he didn't know just what the bank's attitude would be toward * * * these forged checks"; that Westover then urged him to pay their note, and said "the minute we were ready to take care of this \$4,000.00 note, that he would take the other matter into consideration." Periodically thereafter until December, 1932, the bank charged the defendants' account with payments of interest due on their promissory note and credited the sums to the note, informing them in writing of each transaction. No objection was ever made to these payments of interest. February 15, 1933, the president of the bank wrote the following letter to the defendants regarding the payment of the note and the forged checks:

"In connection with your loan. At the time you called at my house with regard to this matter about a month ago you advised, on leaving, that you would take the matter up again soon. We have not heard anything further since that time.

"We now insist that this note be taken care of as it is long past due. If there is some adjustment, legally, due you gentlemen on account of that supposed forgery we will take that up as a separate matter and are perfectly willing to consider it in every angle from the legal standpoint. The note, however, was a separate obligation to be paid long ago. * * *

Mr. Rocca, the president of the bank, testified that he was present and overheard the conversation between Forni and Westover on the Monday following January 3, 1931. He testified that Westover told him, "Forni says that Bower has forged some checks on the Vineyard Company's account." When Rocca asked where the checks were, Forni replied that they seemed to be lost. The president said that he heard no conversation regarding the payment of the defendants' note and that he did not hear Forni make any

claim against the bank for the repayment of the amount of the forged checks. Rocca said he had never heard of the defendants making any claim against the bank for the payment of the forged checks until they came to his home for that purpose the first Sunday in January, 1933. In reply to their demand, which was then made, the letter of Mr. Rocca which is heretofore quoted was written to them.

Suit was commenced in April, 1933, on the defendants' promissory note to collect the balance of \$1,200 and interest which was due thereon. The defendants answered the complaint, admitting the execution of the \$4,000 note, and the payment of \$2,800 on account thereof, but affirmatively alleged, as a matter of defense, that the bank had wrongfully paid and charged to their account seven forged checks aggregating the sum of \$850 which, on January 5, 1931, Mr. Westover, the vice president, agreed to credit on the defendants' note, but failed to do so; that the defendants, relying on that promise, failed to commence an action against the bank to recover the sum of money paid on the forged checks within the statutory period of time allowed therefor, but that the plaintiff was estopped by its conduct from setting up the statute of limitations on the last-mentioned suit.

The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff in which the court held that the seven checks aggregating the sum of \$850 were forged and that they were paid by the bank and charged to the account of the defendants therein, but that suit against the bank, on that account, was barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure. Judgment was thereupon rendered for the unpaid portion of the promissory note in the sum of \$1,200 together with interest thereon from December 8, 1932, at the rate of 7 per cent. per annum. From this judgment the defendants have appealed.

There is ample evidence to support the finding that the seven checks aggregating the sum of \$850 were forged, and that they were paid by the bank and the sum thereof was charged to the account of the defendants.

[1] We are also of the opinion there is ample evidence to support the finding of the court "that it is not true that on January 5, 1931, or at any other time, the plaintiff promised or agreed to credit the amount of said (forged) checks or any amounts to the defendants, * * * or * * * that the question of said forgeries would be taken

into consideration at such time thereafter as the defendants should tender payment of the balance of said promissory note." While the officers of the bank admit that their attention was called to the fact that forged checks aggregating the sum of \$850 had been paid and charged to the account of the defendants, it is asserted the defendants did not demand a return of that money, and that the officers of the bank did not agree to credit that sum to the promissory note. Mr. Forni says that Mr. Westover merely told him that the bank would "consider" their claim when the note was paid. This is not a promise to credit the defendants with that sum of money on their promissory note. Frank Piner, the cashier of the plaintiff bank, testified regarding the alleged agreement of Mr. Westover to take into consideration the adjusting of the seven forged checks when the defendants' note was satisfied, that he was present on January 5, 1931, and heard the conversation between Forni and Westover, and he said that: "I never heard Mr. Westover make any statement that he would take these checks into consideration when they paid their note." The president, Mr. Rocca, in the only written instrument which was received in evidence regarding the alleged promise to credit the amount of the forged checks to the defendants' note, clearly states that the bank "will take that matter up as a separate matter." He concludes his letter by saying, "The note, however, was a separate obligation." This amounts to a denial that the bank agreed to credit the amount of the forged checks on the note, and supports the court's finding to the effect that the bank did not agree to credit the defendants' note with the amount of the forged checks.

[2] The appellants, however, contend that the court erred in precluding them from introducing further evidence to the effect that the conduct of the plaintiff caused them to forbear the commencement of an action to recover from the bank the \$850 paid from their account on the forged checks. We are of the opinion the appellants are mistaken in that regard. Only two rulings of the court are complained of. The following question was propounded to the defendant Forni by counsel for the appellant: "Q. I will ask you, Mr. Forni, if you wrote and signed your name to any checks or withdrawals of those items on or about those dates?" To this question the plaintiff's attorney objected on the ground that the claim for reimbursement of \$850 paid from the defendants' account upon the forged checks was barred by the

provisions of section 340, subd. 3, of the Code of Civil Procedure. The court reserved its ruling on that objection. Assuming, however, that the appellants were thereby precluded from eliciting the direct answer to that question by the witness, the excluded answer is harmless for the reason that the same witness subsequently stated that the seven checks were forged by Mr. Bower. The question merely called for the reply that Forni signed none of those checks and that they were therefore forged. Mr. Rocca, the president of the bank, subsequently admitted that he overheard the conversation between Westover and Forni in which the former said: "Forni says that Bower has forged some checks on the Vineyard Company's account." The judge of the court asked the witness Forni the following question: "Mr. Forni, you state that in January of 1931, you first discovered the forgeries?" to which he answered, "Yes sir." The defendants were not precluded from attempting to prove their theory that the plaintiff agreed to credit the amount of the forged checks toward the payment of their note. The court asked Mr. Forni: "Now he (Westover) then told you that he would offset the amount of this, of these checks against the amount on your note?" An objection to this question was overruled, and the witness replied, "Yes sir." Forni further testified in that regard: "We talked upon the question of the \$850.00 being overdrawn, by checks not signed by us." Defendants' counsel then asked Forni, "What did he (Rocca) say?" To this question the objection last mentioned was renewed. The court, however, overruled the objection and permitted a full examination of the witness on that subject. Moreover, the court found in favor of the defendants to the effect that the checks in question were forged and that they had been charged to the defendants' account.

[3] The only other ruling complained of by the appellants occurred as follows: The defendants' attorney said, "I would like to ask Mr. Forni one further question, * * * if at any time prior to the institution of this suit you filed any action or took any legal proceedings to collect the \$850.00, the amount of the forgery?" An objection to this question, on the ground that "the record would be the best evidence" of a failure to commence such an action, was sustained. Assuming,

without so deciding, that the reply to that question would have been competent evidence, the ruling was harmless, for the reason that the court determined that the plaintiff did not agree to credit the amount of the forged checks on the defendants' note. It follows that if no such agreement was made by the plaintiff, it would be immaterial in this action whether or not defendants commenced a suit to recover the amount charged against their account for the payment of the forged checks. Moreover, the defendants' answer alleged that they did not commence such an action.

[4] Assuming that the finding of the court is sufficiently supported by the evidence to the effect that the plaintiff did not agree with the defendants to credit their note with the amount of \$850 deducted from their account in payment of the forged checks, the defendants are not entitled to a set off against the unpaid amount of their note, for the reason that their action against the plaintiff to recover that sum was barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure. That section provides that an action "by a depositor against a bank for the payment of a forged or raised check" must be commenced within one year. *Union Tool Co. v. Farmers' & Merchants' National Bank of L. A.*, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417; *Glassell Dev. Co. v. Citizens' Nat. Bank of L. A.*, 191 Cal. 375, 216 P. 1012, 28 A.L.R. 1427. In the present case, it is conceded that the defendants had knowledge of the forgeries January 5, 1931, and yet they failed to institute an action to recover the amount wrongfully paid by the bank from their account, within the statutory limitation prescribed therefor. Not until they set up in their answer the alleged agreement to credit that amount on their promissory note, did they make that claim, according to the findings which were adopted in this case. Since the defendants failed to establish their claim that the plaintiff agreed to credit their note with the amount of the forged checks which were paid, that defense is barred by the statute of limitations, and the plaintiff is not estopped from urging the statute as a bar to their defense.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

5 Cal.App.2d 33

PEOPLE v. STEPHENS.

Cr. 1827.

District Court of Appeal, First District,
Division 1, California.

March 1, 1935.

1. Assault and battery ☞96(3)

In prosecution for assault, where accused denied having used, or threatened to use, any violence on allegedly assaulted person, instruction on self-defense held properly refused.

2. Assault and battery ☞83

In prosecution for assault upon police officer investigating alleged communist disturbance, evidence that one hour after first investigation police had raided another hall held irrelevant.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Augustus Stephens was convicted of simple assault, and he appeals.

Affirmed.

Leo Gallagher, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sifton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

Appellant was charged with having committed a felony, an assault with a deadly weapon; and he was found guilty by a jury of the lesser offense, simple assault. The sentence was that he pay a fine of \$250, or in default of such payment be imprisoned in the county jail one day for each \$5 of said fine, not exceeding, however, thirty days. From the judgment of conviction and the order denying his motion for new trial, he has taken this appeal.

The alleged assault was committed on a police officer, named Anderson, in Oakland on July 16, 1934; and the sufficiency of the evidence to sustain the conviction is not questioned. The grounds urged for reversal are that the court erred in refusing to give several instructions proposed by appellant and in ruling upon the admissibility of certain testimony.

The circumstances under which the assault was committed, as shown by the evidence adduced on the part of the prosecution, were as follows: Shortly after the noon hour on the day in question, eight or ten police officers,

including Anderson, were sent by their superior officers to 645 Twenty-Second street, in response to a report received at police headquarters that there was a disturbance there—that a number of communists armed with clubs were just starting to leave the place. Upon reaching the premises, Anderson proceeded up a flight of stairs, and, as he opened the door at the top of the stairs, appellant, who was standing just inside the door, struck at Anderson's head with a club or board in which there was a protruding nail. The officer turned his head quickly to one side to dodge the blow and the force of it landed on his shoulder; whereupon he grappled with appellant, and with the aid of his riot stick tried to restrain him. Several other officers came to Anderson's assistance, but appellant succeeded in fighting his way loose and ran down the stairs. He was caught as he reached the street, however, and taken to prison. Testifying in his own behalf, appellant denied having struck at the officer at all or having had in his possession at any time any club, board, or other like weapon. He stated that, hearing a commotion on the stairway, he opened the door slightly, and as he did so some one outside pushed it open wider; that he then stuck his head through the doorway to see what was going on, and instantly he was struck over the head a number of times by the police with clubs, black-jacks, and fists; that he fell to the landing, and before he could arise was kicked by the police, following which he was taken to jail.

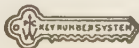
[1] The instructions proposed by appellant and by the court refused related to the law of self-defense. Appellant made no claim, however, that he acted in self-defense, nor did he seek to offer any testimony tending to support any such claim. As above stated, he denied absolutely having used, or threatened to use, any violence whatever on Anderson; consequently there was no issue of self-defense involved in the case; and it is well settled that under such circumstances the court should not give any instructions bearing upon that doctrine. *People v. Manoogian*, 141 Cal. 592, 75 P. 177; *People v. Manning*, 146 Cal. 100, 79 P. 856; *People v. La Vers*, 130 Cal. App. 703, 20 P.(2d) 967; *People v. DiDonato*, 90 Cal. App. 366, 265 P. 978.

[2] Nor is there any merit in appellant's second point. In this regard the record shows that on two occasions during the trial appellant sought to elicit testimony showing that within an hour after this trouble occurred at 645 Twenty-Second street the police raided

and partly demolished the headquarters of an organization known as the International Labor Defense, at 1020 Broadway in Oakland. The purpose of such testimony was, so appellant claimed, to prove the existence of a conspiracy on the part of public officials, particularly the police, in the bay regions to destroy halls and make illegal arrests of communists or any one else who happened to be in those halls. As held by the trial court, these matters were entirely foreign to any issue involved in the case. The single issue presented was whether appellant struck the police officer as claimed by the officer, and the jury decided on conflicting evidence that he did. Counsel for appellant argues that the disputed testimony, if admitted, would have aided the jury in determining which of them told the truth, appellant or the police officer. It has been repeatedly held, however, that evidence relating to matters extraneous and irrelevant to the issue being tried is not admissible, either for the purpose of impeachment or any other purpose. 27 Cal. Jur. 106, 152.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.



5 Cal.App.2d 82

PEOPLE v. BINSFELD.
Cr. 1420.

District Court of Appeal, Third District,
California.
March 4, 1935.

Criminal law ⇨1182

Where no brief was filed nor appearance made for defendant when case was called for hearing, judgment of conviction was affirmed under statute (Pen. Code, § 1253).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Charles F. Binsfeld was convicted of being a person who had been convicted of a felony under California laws and owned or had in his possession a firearm and pistol capable of being concealed on his person, and he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sacramento county of a felony, to wit, being a person who has been convicted of a felony under the laws of the state of California, and owned or had in his possession and under his custody and control a firearm and pistol capable of being concealed upon his person.

The transcript on appeal was filed in this court January 28, 1935. No brief has been filed in behalf of appellant. The cause was regularly place on the calendar for oral argument on March 4, 1935. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.



5 Cal.App.2d 83

POTTS v. CRAFTS.
Civ. 1352.

District Court of Appeal, Fourth District,
California.
March 4, 1935.

1. Theaters and shows ⇨6

Proprietor of public place of amusement owes to his patrons duty of using ordinary or reasonable care to see that they are not injured.

2. Appeal and error ⇨1011(1)

In action for injuries sustained by nine year old boy while driving miniature automobile over oval board track in place of amusement, finding of trial court sitting without jury, upon conflicting evidence that board track was negligently constructed and maintained by defendant would not be disturbed.

3. Appeal and error ⇨1038(1)

In action for injuries sustained by nine year old boy while driving miniature automobile over oval board track in place of amusement, whether owner of amusement place ex-

exercised reasonable care held for trial court sitting without jury.

4. Appeal and error ⇐1008(1)

Contributory negligence of child of tender years is question of fact to be decided in trial court, whose decision is controlling on appeal.

5. Appeal and error ⇐1008(1)

Whether nine year old boy who drove miniature automobile over opening in oval track after he knew of its existence was contributorily negligent held for trial court sitting without jury.

6. Theaters and shows ⇐6

Owner of amusement place could not escape liability for injuries sustained by nine year old boy while driving miniature automobile over oval board track under doctrine of assumption of risk, since such doctrine is applicable only to relation of master and servant.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Donald Potts, a minor, by G. F. Potts, his guardian ad litem, against O. N. Crafts. Judgment for plaintiff, and defendant appeals.

Affirmed.

Clyde E. Cate, of Fresno, for appellant.

Claude Minard, of Fresno, for respondent.

MARKS, Justice.

On August 24, 1933, Donald Potts was a minor of the age of nine years. He was injured on that day while driving a miniature automobile over an oval board track, both of which were the properties of defendant. This action was brought to recover for the damages suffered. The judgment awarded damages in the total sum of \$500.

Defendant was operating a place of amusement in the city of Fresno on August 24, 1933. It was designated as "Crafts 20 Big Shows," and various forms of amusements were offered to the public upon the payment of a required charge. Donald Potts drove the miniature automobile around its oval track twice without accident, but on the third trip its left front wheel fell into an opening three or four inches wide between the boards of the runway and the injury to the child resulted.

[1] The proprietor of a public place of amusement owes to his patrons the duty of using ordinary or reasonable care to see that

they are not injured. *Johnstone v. Panama Pacific I. E. Co.*, 187 Cal. 323, 202 P. 34; *Sharpless v. Pantages*, 178 Cal. 122, 172 P. 384.

The trial court found that "said board track was so negligently and carelessly constructed, erected and maintained by the defendant to the extent that a portion of one of the transverse boards forming said track was broken off and missing on the 24th day of August, 1933, in such a manner that a crack or crevice was left in said track running in a transverse manner across said track and of a width of several inches."

[2, 3] This finding is assailed by defendant as not being supported by, and as contrary to, the evidence. The minor and one of his boy companions testified that the opening was there and that the automobile wheel dropped into it. This was denied by the defendant and his witnesses. Thus a conflict was created which was resolved in favor of plaintiff by the trial court. Where there is evidence supporting a finding, we cannot set aside a judgment simply because the testimony of a number of witnesses would prove the existence of facts contrary to those found by the trial court. Furthermore, it is generally held that what is the exercise of ordinary or reasonable care in cases of this kind is a question to be decided by the trier of fact. *Rovvegno v. San Jose K. of C. Hall Ass'n*, 108 Cal. App. 591, 291 P. 848.

[4] Defendant maintains that the evidence shows the minor guilty of contributory negligence. It is very generally held that the contributory negligence of a child of tender years is a question of fact to be decided in the trial court and that its decision is controlling on appeal. *Woodman v. Hemet Union High School Dist.*, 136 Cal. App. 544, 29 P.(2d) 257.

[5, 6] Defendant urges that he should escape liability under the doctrine of assumption of the risk. There is nothing in the record indicating that the father of Donald had any intimation that there was an opening in the track prior to the happening of the accident. Donald testified that he knew it was there. He had rented the miniature automobile twice before the trip on which the accident happened and had driven over the opening with safety a number of times. Strictly speaking, the assumption of the risk doctrine is applicable to the relation of master and servant. 16 Cal. Jur. 1061. In negligence cases such as we have before us the assumption of a risk by an injured party usually is con-

sidered under the head of contributory negligence. The question of whether a minor of nine years of age was negligent in driving the miniature automobile over the opening in the oval track after he knew of its existence was one for the determination of the trial court. Under the facts before us, we cannot say that the finding against contributory negligence is without evidentiary support.

The other grounds urged for a reversal of the judgment need not be separately mentioned. We have considered all of them and can find no merit in them.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



5 Cal.App.2d 134

PEOPLE v. MAHER.
Cr. 178.

District Court of Appeal, Fourth District,
California.
March 5, 1935.

1. Homicide ☞309(5)

Issue of manslaughter need not be submitted to jury in homicide prosecution when evidence does not show any elements of manslaughter and facts warrant only verdict of murder or of acquittal.

2. Homicide ☞309(3)

Refusal to submit question of manslaughter in homicide prosecution held proper under evidence that defendant, considerable time after first disagreement with deceased, forced his way into café with gun and deliberately shot deceased who had thrown his hands up and asked defendant not to shoot.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

William Maher was convicted of murder in the second degree, and he appeals.

Affirmed.

Tom Okawara, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant was convicted of murder in the second degree and has appealed from the judgment and from an order denying his motion for a new trial.

[1] It is conceded that he shot and killed one Robert Daugherty in the town of Mendota early in the morning of March 2, 1934. No claim is made that the evidence is not sufficient to sustain a conviction of murder in the second degree and practically the only contention here is that the court erred in failing to give an instruction defining manslaughter, in not referring to manslaughter in another instruction, and in not including such a verdict in the possible forms for a verdict which were submitted to the jury. It is well settled that such an issue need not be submitted to a jury when the evidence does not show any of the elements of manslaughter and when the facts are such as to warrant only a verdict of murder or one of acquittal. *People v. Ferugia*, 95 Cal. App. 711, 273 P. 99; *People v. La Vers*, 130 Cal. App. 708, 20 P.(2d) 967; *People v. West*, 215 Cal. 87, 8 P.(2d) 463; *People v. Johnson*, 219 Cal. 72, 25 P.(2d) 408.

[2] The appellant, a butcher, and the deceased, a barber, worked in adjoining shops in the town of Mendota. Late in the evening of March 1, 1934, the two entered a café and beer parlor and engaged in playing poker. About midnight a man known as "Red" entered the café and joined in the game. Shortly thereafter an argument arose between the deceased and Red, during which the deceased knocked Red to the floor and kicked him. The appellant remonstrated, remarking that he did not think much of a man who would kick another while he was down. A little later the men went outside where the fight between Red and the deceased was resumed, at which time the appellant urged Red, who was getting the worst of it, to whip the deceased. The fight soon broke up and the deceased went away while Red and the appellant returned to the vicinity of the café. About half an hour later, the deceased appeared in his automobile across the street from the café and the appellant and Red went up to the car, one on each side. Almost immediately the deceased screamed and jumping from his car ran into the café with blood streaming from his head. He exclaimed, "They have hit me over the head with a wrench." At that time he had a wrench handle in his hand. Two customers in the café took the deceased to the kitchen and washed his injuries. At

that time the deceased picked up a butcher knife and said, "I am going out and get the fellows." However, one of the customers took the knife from him and hid it. The deceased then proceeded to the porch of the café, where he fainted. He was taken back into the café and revived with wet towels and water. While this was going on, the proprietor of the café ran outside and told the appellant and Red that the deceased had a knife, which had been taken from him, and that they should go home and go to bed. They both told the proprietor that they would do this.

While the deceased was in the café, receiving first aid, the appellant and Red went to a service station, after which the appellant proceeded to the butcher shop where he was employed and remained there about five minutes. After the deceased had been revived, he started to leave the café to go home, preceded by one of the customers there. As they reached the front door, the appellant appeared with a gun in his hand, which he cocked as he approached the door. He then forced his way past the proprietor of the café and the customer, who were both on the outside at that time, and while so doing he stated, "Where is the barber. Get out of the way I've got a rod I will shoot your guts out." As the appellant entered the café, the deceased was standing back of the stove and near the kitchen. The deceased threw up his hands and said, "Bill don't shoot. Put that gun up." At that time the deceased's hands were empty. The appellant fired four or five shots, three of which struck the deceased, killing him almost instantly. Shortly thereafter an officer arrived and the appellant gave him his gun and said: "Here it is, Rip. I done it. * * * I guess it is a good thing, Rip, I ran out of ammunition or you and I would have had it out." He also said to the officer: "I will be executed for this." Some time later he stated to his employer that after the affair near the automobile, across from the café, he went to his butcher shop and took three or four drinks of wine and that, "You know the rest."

More than half an hour elapsed between the first disagreement between the appellant and the deceased and the episode at the automobile. Whatever occurred there, the deceased was injured and ran from the scene and into the building where he was given aid. A considerable time then elapsed during which the appellant went first to a service station and then to his shop where he drank several glasses of wine. He then went back to the café, cocked his gun as he approached,

forced his way past two people, and then deliberately shot the deceased who had thrown his hands in the air and asked him not to shoot. There is nothing in any of these facts to justify the submission of a question of manslaughter to the jury, and the court properly refused to submit such an issue.

Some contention is made that another instruction, on the subject of malice, should not have been given. While the appellant concedes that it correctly stated the law, it is argued that it did not sufficiently aid the jury in determining the degree of the homicide in the event that they should find the same was committed without malice. While the other instructions are not referred to or set forth, the jury was fully and fairly instructed upon this as well as other matters and this contention is without merit.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.



5 Cal.App.2d 131

In re BLACKMON'S ESTATE.

BLACKMON v. BLACKMON.

Civ. 8632.

District Court of Appeal, Second District,
Division 2, California.

March 5, 1935.

Rehearing Denied April 3, 1935.

Hearing Denied by Supreme Court
May 3, 1935.

Descent and distribution $\S$ 71(7)

In proceeding to determine heirship, where Court of Appeal reopened case, issue concerning identity of decedent and defendant's husband, and issue whether defendant had renounced all rights to estate, involved fact questions more readily triable in superior court than in Court of Appeal, which would remand cause for trial thereon instead of having additional evidence taken before referee (Code Civ. Proc. $\S$ 1664, now Probate Code, $\S$ 1080).

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate of Leon Blackmon, deceased. Petition by Mary B. Blackmon against Lillie Stewart Blackmon to de-

termine heirship. Judgment for defendant, and plaintiff appeals.

Affirmed in part, and cause remanded.

H. L. Welch, of Los Angeles, and Don C. Bitler, of El Centro, for appellant.

James H. O'Neill, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment rendered under the provisions of section 1664, Code of Civil Procedure, now section 1080 of the Probate Code, to determine heirship, in which it was established that Lillie Stewart Blackmon (defendant) was the surviving spouse of the decedent, and that his later marriage to Mary Blackmon (plaintiff) was bigamous and void. It is the contention of Mary Blackmon on appeal that there was no substantial evidence to overcome the presumption which the law gives to her marriage that the decedent had obtained a divorce prior to the time the marriage was solemnized.

The defendant testified at the trial that she had married the decedent under the name of Leroy Blackman (not Leon Blackmon) in the year 1909, and had lived with him for about one year when he had deserted her. She admitted, however, that she had never again seen the decedent before or after his death. The plaintiff contended that she and the decedent were married during the year 1918, and that they had lived together as husband and wife from that time on until his death. As already indicated, the trial court found with the defendant.

After the appeal had been taken and while the matter was pending in this court, the plaintiff filed her "Application for leave to produce additional evidence in the proceeding to determine heirship in said estate" in which she alleged, among other things, that she was taken by surprise by the evidence of defendant at the trial and that if the case were reopened she would prove by overwhelming evidence, including the written admissions and statement of the said defendant, that defendant is not the widow of Leon Blackmon and not an heir to his estate, but that defendant was married to an entirely different person, a Leroy Blackman, who is still living and therefore cannot be the deceased; that the defendant had now renounced in favor of the plaintiff all claim to the estate and had directed her attorney to dismiss her claim. Plaintiff attached to her application the affidavit of several witnesses to substantiate her

claim, and she also attached the alleged renunciation, which need not be repeated here. After a hearing in this court upon said petition the application was granted and the case reopened. A large number of depositions were taken and filed, and this court appointed Honorable Walter J. Desmond as referee to take further testimony. Thereafter motions were made in this court to require a bond for costs, to strike appellant's brief, to dismiss or affirm, and to fix the issues to be decided by the referee. All of these motions except the latter were denied. During the last three months the case has been on the weekly calendar of this court as regularly as the habit of coffee for breakfast. On January 18, 1935, a stipulation was entered into by the parties in open court that the court will review the briefs, exhibits, and documents legally of record in the case, and decide the case, if the court can do so without taking additional evidence. Or, if it is decided that additional evidence shall be taken, the matter will then be sent back to the superior court for that purpose.

After a careful review of the record we are satisfied that the judgment of the superior court should be affirmed in all respects except as to the identity of Leon Blackmon and Leroy Blackman; a finding on this specific issue will carry with it a finding of the ultimate fact that the defendant is or is not the surviving widow of the decedent, and that she is or is not entitled to share in his estate. A second issue which has not heretofore been tried, but which is now before the court for solution is: Has the defendant renounced all right, title, and interest in and to the said estate in favor of the plaintiff? Both of these issues involve questions of fact which are much more readily triable in the superior court than in this court.

The case is therefore remanded to the trial court for the determination of these two questions and the issues arising thereon. In that court the plaintiff may set up her said two grounds for relief or recovery against the defendant. Thereupon the defendant may by appropriate pleadings set up such defenses thereto, if any, as she may have. The issues thus joined may be tried in the superior court and judgment entered in accordance with the findings. The depositions and other evidence which are on file in this court will be filed with the clerk of the superior court for use in that court in the trial of the above issues.

A ruling on the motion to fix issues to be decided by the referee is made unnecessary

because we have fixed the issues to be tried by the superior court. The order appointing Judge Desmond as referee of this court is revoked as of this date. Except as otherwise indicated, the judgment is affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



5 Cal.App.2d 106

ZVOLANEK v. BODGER SEEDS, Limited.
Civ. 9428.

District Court of Appeal, Second District,
Division 2, California.
March 4, 1935.

Hearing Denied by Supreme Court
May 3, 1935.

1. Damages ⇨5, 159(5)

Damages which necessarily result from act complained of are "general damages," and may be proved under ad damnum clause or general allegation of damage; while those which are natural consequence of act complained of, and not necessary result of it, are "special damages."

[Ed. Note.—For other definitions of "General Damages" and "Special Damages," see Words & Phrases.]

2. Damages ⇨142

Special damage must be specially set forth in complaint or plaintiff will not be permitted to give evidence of it at trial.

3. Damages ⇨103

Measure of damages arising from tort is amount which will compensate for all detriment proximately caused thereby, whether it could be anticipated or not (Civ. Code, § 3333).

4. Damages ⇨39

Damage may necessarily flow from injuries to special variety of sweet peas, having no present market value, the same as from injuries to common variety with provable market value (Civ. Code, § 3333).

5. Damages ⇨174(3)

In action for injuries to growing crop and seeds thereof, which had no present market value, to prove damage required evidence of different elements which, singly or in combination, represented value of crop destroyed in condition it was at time of injury (Civ. Code, § 3333).

6. Damages ⇨11

In cases where property destroyed or lost has no market value, plaintiff's recovery is not limited to nominal damages (Civ. Code, § 3333).

7. Damages ⇨174(3)

Where article or thing is so unusual in character that market value cannot be predicated of it, its value, or plaintiff's damages, must be ascertained in some other rational way by court or jury in exercise of sound discretion from such elements as are attainable, such as difficulty and expense to which plaintiff was put in acquiring property, nature and character of use to which it was put by him, and the like (Civ. Code, § 3333).

8. Damages ⇨174(3)

In action for injuries to special varieties of sweet peas which were in process of development to future status which would be productive of seed with market value, testimony as to amount of ground space occupied, method of producing them as hybrids by means of cross-pollination, manner of raising them, amount and value of time expended, and rental value of land used, held properly admitted (Civ. Code, § 3333).

9. Damages ⇨112

Statute providing that peculiar value of property to person recovering damages for deprivation thereof or injury thereto may be deemed its value against one who had notice thereof before incurring liability to damages in respect thereof, or against willful wrongdoer, held to deal with property which has market value and also peculiar value to owner, and not with property having no market value (Civ. Code, § 3355).

10. Damages ⇨174(3)

In action for injuries to special varieties of sweet peas in process of development to future status which would be productive of seed with market value, but which had no present market value, admission of evidence as to what value of seed was to plaintiff on date of loss, which evidence attempted to prove peculiar value held error (Civ. Code, § 3355).

11. Appeal and error ⇨1054(3)

In action for injuries to special varieties of sweet peas which had no present market value, error in permitting plaintiff to testify as to what value of seed was to him held not prejudicial, where plaintiff testified that he valued seed at \$20,000 and court found that damage amounted to \$1,000, which finding showed that plaintiff's testimony did not affect court's estimate of damage which was based on other elements of value which were established by evidence (Civ. Code, § 3355; Const. art. 6, § 4½).

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Ant. C. Zvolanek against Bodger Seeds, Limited, a corporation. From a judgment for plaintiff, defendant appeals.

Affirmed.

Denio, Hart, Taubman & Simpson and Matthew C. Simpson, all of Long Beach, for appellant.

Heaney, Price & Postel, and Clarence A. Rogers, all of Santa Barbara, for respondent.

WILLIS, Justice pro tem.

Defendant has appealed from a judgment awarding damages for injuries to land and sweet peas situated thereon, resulting from flooding by water through the negligent acts of the defendant.

Plaintiff alleged that defendant so negligently flooded its lands in process of irrigation that water ran into and over the land of plaintiff and the sweet peas situated thereon, and "damaged the said land and sweet peas thereon to the amount of five thousand five hundred dollars." At the trial it developed that the sweet peas so injured were special experimental varieties propagated and cultivated over a period of successive years to the end that new and special varieties of sweet peas might be produced in quantities sufficient to make seed for market uses, but which at the time of injury had not reached the stage where any market value had attached to seeds produced therefrom. Over defendant's objection plaintiff was permitted to give testimony as to the amount of ground space occupied by these special varieties, as to the method of producing them as hybrids by means of a cross-pollination, as to the manner of raising them, the amount of time expended during the preceding years from first cross-pollination to date, the value of the time so expended, the rental value of the land used for producing such specialties, and the value to plaintiff of the seed lost by reason of the flooding. The ground of objection to the admission of such evidence in each instance was founded on the proposition that such testimony was evidence of special damages and not admissible because special damages were not pleaded in the complaint. On this appeal this point is presented, and, in addition, it is contended that such proof, regardless of the character of the pleading of damages, was not admissible because it related to elements of damage too remote and speculative to sustain the judgment of \$1,000 entered herein.

[1-11] Damages are either general or special. Damages which necessarily result from

the act complained of are denominated general damages and may be proved under the ad damnum clause or general allegation of damage; while those which are the natural consequence of the act complained of, and not the necessary result of it, are termed special damages. Special damage must be specially set forth in the complaint or the plaintiff will not be permitted to give evidence of it at the trial. *Treadwell v. Whittier*, 80 Cal. 574, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. The measure of damages arising from tort, such as the one herein pleaded, is the amount which will compensate for all detriment proximately caused thereby, whether it could be anticipated or not. Civ. Code, § 3333. The damage alleged herein was that which necessarily resulted from the flooding of the land and the sweet peas thereon. The sweet peas were shown by evidence to have been special varieties or specialties in process of development to a future status which would be productive of seed with market value. Damage to a special variety of sweet peas is not necessarily special damage. Damage may necessarily flow from injuries to a special variety, having no present market value, the same as from injuries to a common variety with provable market value. In the case at bar the damage sought to be recovered is the general damage to a growing crop and the seeds thereof, which had no present market value. To prove such damage required evidence of the different elements which, singly or in combination, represented the value of the crop destroyed by the acts complained of, in the condition it was at the time of injury or destruction. *Shoemaker v. Acker*, 116 Cal. 239, 48 P. 62; *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 90 P. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779. In cases where property destroyed or lost has no market value, while there may be no rule which will be absolutely certain to do justice between the parties, it does not follow, nor is it the law, that plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in character that market value cannot be predicated of it, its value, or plaintiff's damages, must be ascertained in some other rational way from such elements as are attainable, such as the difficulty and expense to which plaintiff was put in acquiring the property, the nature and character of the use to which it was put by him, and the like. All these elements being shown, the value is to be determined by the court or jury by the exercise of a sound discretion. *Willard v. Valley Gas & Fuel Co.*, 171 Cal. 9, 151 P. 286; *Hoffman v. Eastman Kodak Co.*, 99 Cal. App. 436,

PEOPLE v. MANN.

Cr. 2595.

District Court of Appeal, Second District,
Division 2, California.

March 1, 1935.

1. Criminal law $\Rightarrow$ 419, 420 (12)

In prosecution for assault with deadly weapon written confession of defense witness made to defense attorney in respect to his connection with alleged assault *held* properly excluded.

2. Criminal law $\Rightarrow$ 772 (5)

In prosecution for assault with deadly weapon, instruction that absence of motive was circumstance in favor of defendant's innocence *held* properly rejected.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

William A. Mann was convicted of simple assault, and he appeals.

Affirmed.

John Dennison, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

[1] Defendant was charged with assault with deadly weapon, to wit, a standard building brick, on complaining witness. The latter had retired, and arising later went to the window of the front room occupied by her child. Outside and six or seven feet away she saw a man, who hurled a brick at her through the window, ran down the street, and, entering an automobile, drove away. Her husband in the meantime went out of the house and saw the assailant. Both identified him as defendant, who is the husband of complainant's aunt. The jury convicted defendant of simple assault. From such judgment and the order denying motion for new trial this appeal is taken. Testimony was offered by defendant to establish an alibi. In addition thereto a defense witness was called to the stand, and when asked whether he had committed acts constituting the crime charged against defendant, availed himself of his constitutional immunity against such questions. He was asked whether he had confessed to defense counsel the matters concerning which he was questioned on the stand, and admitted that he had made

278 P. 891. The course pursued by respondent in producing proof of damage by the questions objected to was in harmony with these rules. Each item sought to be proved related to a loss necessarily resulting from the flooding, and no error was committed in admitting the evidence objected to, excepting, however, the last question and ruling excepted to, relating to the value to respondent of the seed lost. The question was: "What was the value to you of the seed lost on this acre and a half of ground on August 12, 1930?" This amounted to an attempt to prove "peculiar" value. Section 3355 of the Civil Code provides that the peculiar value of property to the person recovering damages for deprivation thereof, or injury thereto, may be deemed its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer. Herein there was no proof of notice to appellant of such peculiar value, nor that appellant was a willful wrongdoer. And this section deals with property which has a market value and also a peculiar value to the owner, and not with property having no market value. *Willard v. Valley Gas & Fuel Co.*, supra. Hence it was error to admit evidence of such peculiar value as the value or damage which respondent was entitled to recover. The answer given was "\$20,000.00." The court found that the damage amounted to \$1,000. It is quite patent that the question and answer as to value to respondent did not affect the court's estimate of damages based on the other elements of value which were established by evidence. After an examination of the entire cause, including the evidence, we are of the opinion that the error in admitting the evidence of the value to respondent of the seed lost has not resulted in any prejudice to appellant nor in a miscarriage of justice. Const. art. 6, § 4½. The evidence showing the amount and value of the time devoted over the six-year period to development of these special varieties reveals by computation that the loss suffered by plaintiff in that respect alone exceeds the amount awarded by the court.

For the reasons above given, it must also be held that there is no merit in the contention that the evidence admitted over the other objections above referred to related to elements too remote and speculative to justify its admission. Such evidence all related to definite elements of loss sustained.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

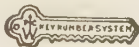
such a statement and had sworn to it before a notary. The alleged written confession, during the examination of the witness, was read piecemeal to the jury; but when offered in evidence it was excluded. Such extrajudicial confession of a third person was properly kept out of evidence. *People v. Woods*, 90 Cal. App. 753, 266 P. 361; *People v. Flood*, 41 Cal. App. 373, 182 P. 766. The record shows, nevertheless, that the jury had before it the testimony of the witness which embraced the alleged confession, so that they would have known no more if it had been stamped by the clerk, filed, and read over to them.

On motion for new trial this witness offered to take the stand and waive immunity in case of a second trial. The court declined to follow such a course. We are unable to say that it was an abuse of discretion.

[2] The trial court properly rejected an instruction to the effect that absence of motive was a circumstance in favor of defendant's innocence. *People v. Wilkins*, 158 Cal. 530, 111 P. 612; *People v. Page*, 86 Cal. App. 148, 260 P. 591.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 731

**RIVER FARMS CO. OF CALIFORNIA v.
GIBSON, County Treasurer, etc. (MOR-
RIS et al., Interveners).**
Civ. 5194.

District Court of Appeal, Third District.
California.

Feb. 25, 1935.

Rehearing Denied March 27, 1935.

Hearing Denied by Supreme Court
April 25, 1935.

1. Drains ⇨88

Levees and flood control ⇨28

If constitutional, statute governing sale of delinquent lands acquired by reclamation district, though not mentioning earlier statutes regulating such sales, must prevail (Pol. Code, § 3466a, as added by St. 1931, p. 773, § 7; and § 3480, as amended by St. 1923, p. 598, § 1, and St. 1931, p. 762, § 6; St. 1933, p. 1569, §§ 1, 2).

2. Drains ⇨67

Levees and flood control ⇨2

Statute governing sale of delinquent lands acquired by reclamation district, if vio-

lating Constitution, cannot be sustained on ground of emergency (St. 1933, p. 1569, §§ 1, 2).

3. Drains ⇨67

Levees and flood control ⇨2

Statutory amendment authorizing county treasurer as trustee of reclamation district instead of trustee of district's bond fund, as statute originally read, to purchase and sell delinquent lands and to credit proceeds to bond fund, *held* change only in name, not substance, since otherwise statute would impair obligation of contract if transferring any benefits or security from bondholders to district (Pol. Code, § 3480, as amended by St. 1923, p. 598, § 1, and St. 1931, p. 762, § 6; Const. U. S. art. 1, § 10).

4. Drains ⇨18

Levees and flood control ⇨32

Statutory trust created for bondholders *held* to include assessments and redemption money paid to reclamation district, together with proceeds of sales of delinquent lands and proceeds of resale thereof after acquisition by county treasurer as district's trustee, as well as lands so acquired by treasurer (Pol. Code, § 3466a, as added by St. 1931, p. 773, § 7; and § 3480, as amended by St. 1923, p. 598, § 1, and St. 1931, p. 762, § 6).

5. Drains ⇨88

Levees and flood control ⇨28

County treasurer purchasing delinquent lands as reclamation district's trustee *held* bound, like any other trustee, to obtain highest possible market value or at least fair market value on resale thereof, as regards bondholders' rights (Pol. Code, § 3466a, as added by St. 1931, p. 773, § 7; and § 3480, as amended by St. 1923, p. 598, § 1, and St. 1931, p. 762, § 6).

6. Constitutional law ⇨143

Statute providing that persons entitled to redeem delinquent lands sold to reclamation district "may" purchase such lands, within two years from date of statute, for unpaid installments of assessment, less accrued penalties and district's net receipts from lands, *held* unconstitutional because impairing obligation of contract as to bondholders and violating rights of other landowners, since fair market value is unobtainable unless all intending purchasers are free to purchase; word "may" not being merely permissive (Pol. Code, § 3466a, as added by St. 1931, p. 773, § 7; and § 3480, as amended by St. 1923, p. 598, § 1, and St. 1931, p. 762, § 6; St. 1933, p. 1569, §§ 1, 2; Const. U. S. art. 1, § 10).

[Ed. Note.—For other definitions of "May," see Words & Phrases.]

7. Drains ⚡18**Levees and flood control** ⚡32

Although reclamation district is merely arm or agency of state and hence property owned by district is deemed property of state, state does not become "owner," as such term is usually understood, as to delinquent lands purchased by county treasurer as district's trustee, as regards bondholders' statutory right to proceeds of sale thereof (Pol. Code, § 3466a, as added by St. 1931, p. 773, § 7; and § 3480, as amended by St. 1923, p. 598, § 1, and St. 1931, p. 762, § 6).

[Ed. Note.—For other definitions of "Owner," see Words & Phrases.]

8. Constitutional law ⚡143

Statute authorizing delinquent lands acquired by reclamation district to be sold for not less than fair market value as ascertained by board of trustees, thus reopening land to taxation, *held* not to impair obligation of contract as to bondholders, as against contention that sale for less than delinquencies, penalties, etc., was unauthorized (Pol. Code, § 3466a, as added by St. 1931, p. 773, § 7; Const. U. S. art. 1, § 10).

9. Drains ⚡67**Levees and flood control** ⚡2

Statute authorizing persons entitled to redeem delinquent lands acquired by reclamation district to purchase such lands within two years from date of statute for unpaid installments of assessment, less accrued penalties and district's receipts from lands, *held* to effect discrimination unauthorized by police power (St. 1933, p. 1569, § 2).

Petition by the River Farms Company of California for a writ of mandate against California Gibson to compel respondent, as Treasurer of Colusa County and as trustee of Reclamation District No. 108, to accept petitioner's offer to purchase certain land and to execute a deed therefor to petitioner. Intervention by H. C. Morris and another, and also by Frederick F. Cooper and others, as members of the Bondholders' Protective Committee of the Reclamation District.

Writ denied.

Devlin, Devlin & Diepenbrock, of San Francisco, for petitioner.

Ralph W. Rutledge, Dist. Atty., of Colusa, for respondent.

Dunn, White & Aiken, of Oakland, for interveners H. C. Morris and Mary E. Morris.

Iilton T. Farmer, of San Francisco, for interveners Frederick F. Cooper, H. S. Young,

Phillip I. Manson, Fred R. Muhs, and C. E. MacLean, etc.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

No effort is made in this opinion to analyze all, or quote from the almost unlimited number, of cases cited in the briefs, but only such general principles will be set forth and authorities cited as we deem necessary to a solution of the questions involved.

This cause is before us upon the application of the above-named petitioner for a writ of mandate directing the respondent, California Gibson, as treasurer of the county of Colusa, and as trustee of Reclamation District No. 108, to execute a deed of conveyance transferring and conveying to the petitioner a certain tract of land designated as tract No. 64 in assessment No. 5, levied upon the lands in said district covering said tract No. 64, containing about 22.40 acres. This proceeding is based upon the provisions of section 2 of the act of the Legislature approved May 29, 1933, chapter 613, Statutes of 1933, p. 1569, and in compliance with the provisions of the act just referred to the petition sets forth the prior ownership of the land described in the petition; that during the time of the petitioner's ownership of the land, reclamation assessment No. 5 was levied upon the lands within the district covering the land belonging to the petitioner, upon which assessment No. 5 installment calls have been made, which petitioner was unable to pay; that the installments became delinquent, and subsequently thereto the respondent, as the treasurer of the county of Colusa, and acting as trustee for said district, offered the land and premises described in the petition for sale; that no bids or offers were made therefor, and the premises described in the petition were bid in for the benefit of the district, and not being redeemed, were subsequently conveyed to the district; and that the respondent, as treasurer of the county of Colusa, claims the title to the land described in the petition, as trustee for the district.

The petition further sets forth the amount of the installment calls, and also the amount of money realized by the district as rentals received from said tract of land since its conveyance to the district, and the amount of money now due under the provisions of the act of the Legislature referred to, entitling

the petitioner to repurchase the land and premises described in the petition, and that on the 16th day of June, 1934, the petitioner did offer to purchase the parcel of land referred to herein and described in the petition, and tendered to the respondent the amount of money due thereon to entitle the petitioner to become the purchaser thereof; that the respondent refused to accept said money, and also refused to permit the petitioner to become the purchaser thereof, and refused to convey said land and premises to the petitioner.

The prayer of the petition is that the respondent be required to accept the petitioner's offer to purchase the premises described and known as "Tract No. 64," and execute a good and sufficient conveyance thereof to the petitioner.

The answers of the respondent and interveners admit the allegations of the petition, and raise only the question of the constitutionality of chapter 613, supra, section 2 of which reads as follows: "During said period of two years from the effective date of this act, all rentals or moneys received from all lands leased or operated by the board of trustees of a reclamation district shall be forthwith paid to the county treasurer, as trustee of a reclamation district, less the actual and reasonable costs incident and necessary to operating and leasing of said lands, and shall be applied by such county treasurer on account of the payment of all delinquent and unpaid installments of assessments levied and assessed against the particular tract of land from which the income is received, and accrued interest thereon; and during said period of two years from the effective date of this act, any person who was entitled to redeem said lands may purchase said lands at a private sale from the county treasurer or the reclamation district for the amount of all the delinquent and unpaid installments of assessment then owing upon said lands, less the amount of all penalties accrued as of the effective date of this act, but including all penalties hereafter accruing, together with interest upon said amount at the rate of seven per cent (7%) per annum from the date of the respective sales to the date of such purchase, and also less the amount credited upon said delinquent installments and interest received from all rentals, rents and receipts from the renting and operation of said land, as hereinabove provided, which said purchase price may be paid in cash or in matured bonds or coupons thereof of said district issued upon said assessment, and upon the payment of such purchase price, the said

county treasurer shall execute to such purchaser upon such sale a deed conveying said property free of encumbrances except the unpaid and uncalled balance of said assessment, and any other assessment of said district." Section 1 fixes the time and limits the persons who may exercise the right to purchase.

[1, 2] The dates of the occurrences mentioned in the petition bring the acts of the petitioner and the respondent within the terms and provisions of the act under consideration. The life of the act is limited, and no reference therein is made to the sections of the Political Code relating to the sale and disposition of lands upon which installment calls on account of assessments have become delinquent, but being later in time, if constitutional, its provisions must be given effect. If violative of any constitutional provisions, no asserted emergency considerations can be considered as a basis for any decision herein.

The bonds of Reclamation District No. 108 were issued in the year 1925, pursuant to section 3480 of the Political Code as it then read. A consideration of the questions to be answered in this cause necessitates, first, a review of the legislation having to do with the bonds of reclamation districts, levying of assessments, calling of installments, the sales of land allowed to go delinquent, and as well the powers of the trustees of the district and county treasurer of the county in which the principal portion of the lands in the district are situate.

By an act of the Legislature approved June 1, 1923 (Stats. 1923, c. 287, p. 598, § 1 section 3480, supra), after the portions of the section relating to elections, it is specified that if a majority of the votes cast at such election are in favor of the issuance of bonds, the board or trustees of the district shall cause bonds to be issued in amounts specified in the section, bearing interest at a rate not to exceed 6 per cent. per annum, payable semi-annually, the several bonds having coupons representing different or several installments of interest. Following the provisions of the section relating to the sale by the county treasurer, as trustee, the section sets forth that: "All moneys collected by any county treasurer upon any assessment upon which bonds shall have been issued, including all moneys derived from sale of land for delinquent installments, * * * or from sale of lands bought by the treasurer at any such sale, shall be by such treasurer forthwith paid into the main county treasury to the credit of the bond fund of such reclamation

district, and shall be used exclusively for the payment of principal and interest of said bonds issued on such assessment, and of the principal and interest of any refunding bonds issued thereon."

By the terms of the section the lien of any unpaid assessment upon which bonds shall have been issued shall continue until all said bonds and any refunding bonds which may be issued shall have been paid in full. The section likewise specifies that if at the sale no one appears to purchase any of the several tracts upon which the assessment calls have become delinquent, the county treasurer shall, as trustee of the bond fund, purchase the tract or tracts for which no bids were received, issue a certificate therefor, and if no redemption is made within one year, execute a deed to himself as trustee of the bond fund, for all lands purchased as county treasurer and trustee of the bond fund, which have not been redeemed.

The section provides that no bid shall be received which is not equal to the delinquent installment plus all penalties and interests due at the date of the sale. After any sale has been made, any person "interested in the said property may redeem the same at any time within one year after the date of sale, by paying to the county treasurer for such purchaser a sum equal to the purchase price stated in the certificate, with interest thereon at the rate of twelve per cent per annum from the date of sale to such redemption.

* * * Any parcel of land bid in and purchased by a treasurer as aforesaid, as trustee of the bond fund of the district, may be sold and conveyed by him or his successor in office at any time after the expiration of said redemption period of one year, at public or private sale and with or without notice to any person paying him the amount for which said parcel was bid in by said treasurer at delinquent sale, with interest thereon at the rate of seven per cent per annum, compounded yearly, from the date of said delinquent sale, and also the amount of all subsequent installments then delinquent, with accrued interest and penalties thereon." The section also provides that payment of the purchase price may be made in accrued bonds or accrued interest coupons. Notice of sale is required to set forth the amount of the installment; that the land be sold for the amount of the installment; the amount of interest thereon; and penalty fixed at 20 per cent.

After particularly specifying and setting forth the powers and duties of the officers of the district relative to the making of call for installment payments on account of the as-

essment, sale of lands, redemption of lands, etc., the final provision is as follows: "If any land so held by County Treasurer as trustee of the bond fund of a district shall remain unsold after the final installment of the assessment shall have been collected by payment or sale, then such treasurer shall sell all said land so held by him at public auction to the highest bidder for cash, upon two weeks published notice, and shall deposit the proceeds of such sale in the treasury of the main county, to the credit of the bond fund of the district," etc.

By an act of the Legislature approved May 12, 1931 (Stats. 1931, p. 762, § 6), section 3480 of the Political Code was amended so as to lessen the penalty imposed on account of delinquency sales, to 10 per cent. of the unpaid installments. The section as amended, however, still provided that "all moneys collected by any county treasurer upon any assessment upon which bonds shall have been issued, including all moneys derived from sale of land for delinquent installments, or from redemption thereof, or from sale of lands bought by the treasurer at any such sale, shall be by such treasurer forthwith paid into the main county treasury and * * * shall be credited to the bond fund of said reclamation district and used exclusively for the payment of principal and interest of said bonds issued on such assessment, and of the principal and interest of any refunding bonds issued thereon."

The section as amended also provided that at any delinquent sale, if no one bid for any parcel of land upon which an installment had been allowed to go delinquent, the treasurer should bid in the same, and finally, if not redeemed, execute to himself a deed for such lands as trustee of the district. Slightly different provisions are also made as to what taxes, assessments, etc., the lands would still be subject when sold to a purchaser, which, by reason of what we shall say hereafter, we do not deem material. The purchase price could still be made in accrued bonds or accrued interest coupons.

The section as amended likewise provided as follows: "Any parcel of land bid in and purchased by a treasurer as aforesaid, as trustee of the district, may be sold and conveyed by him, or his successor in office at any time after the expiration of said redemption period of one year, at public or private sale and with or without notice to any person paying him the amount for which said parcel was bid in by said treasurer at delinquent sale, with interest thereon at the rate of seven per cent per annum, compounded yearly," etc.

In 1931 (Stats. 1931, p. 773), section 3466a of the Political Code was adopted. This section provides that after the lapse of one year from and after the expiration of the period of redemption of any lands sold in the district pursuant to the provisions of section 3466, 3480, or section 3480a, the county treasurer of the main county, when and as directed by the board of trustees of the district, may, in their discretion (etc.), sell any land remaining unsold, to the highest bidder for cash, at the front door of the courthouse of the main county after giving notice of the time and place of sale, as provided for in the section.

It is further provided that the trustees of the district shall have the right to reject any and all bids, and no bids shall be accepted for an amount less than such price as shall be approved by them. It is further provided that no parcel shall be sold for an amount less than the fair market value thereof, which value is to be ascertained by the board of trustees. The section further provides for management and control of all parcels of land, deeds to which have been executed by the county treasurer to himself as trustee. After providing that certain expenses shall be paid out of the proceeds received from the management of said lands as rentals, or otherwise, the section specifies that: "In the event said district shall be in default for interest or principal payments on any of said bonds issued by said district [any surplus remaining] be deposited in said county treasury of the main county, to the credit of the bond fund of the district. An amount equal to the revenues derived from each tract by reason of the leasing, use or occupation thereof, less the incidental expenses of leasing and holding same, shall be credited by the county treasurer on the assessment lists against the delinquent charges on said tract." The added section then contains the following: "The provisions hereof shall apply to all lands heretofore sold for delinquency to a district or to the county treasurer, as trustee as well as to future sales under assessments whether heretofore, or hereafter to be, levied."

As section 3480, supra, read at the time of the issuance of bonds by Reclamation District No. 108, no parcels of land bought by the treasurer, and deeded to himself as trustee of the bond fund, could be sold for a price less than the amount of the delinquent installments, together with all interest and penalties due thereon, until after the collection of the final installment. Then, power was given to sell all lands then held by the county treasurer as such trustee, at public auction to the highest bidder for cash. This

provision appears to have been eliminated from section 3480, supra, by the act of May 12, 1931 (Stats. 1931, p. 762, § 6), section 3466a, supra, added by Statutes of 1931, p. 773, § 7, apparently being considered as sufficient in relation to the sale of lands held by a district on and after the expiration of one year from the date of redemption.

Section 3480, supra, as it read at the time of the issuance of bonds by Reclamation District No. 108, and also as amended in 1931, gave the county treasurer, as trustee either of the bond fund or as trustee of the district, power to sell, at public or private sale, only upon receiving a bid equal to an amount of the sum of all delinquent installments, including interest and penalties. Section 3466a, supra, gives to the trustees of the district the power to direct a sale of the lands held by the county treasurer as trustee of the district, any parcel of land, or in fact, all parcels of land upon the receipt of a price equal to the fair market value thereof.

[3.4] The change in section 3480, supra, naming the county treasurer as trustee of the district instead of trustee of the bond fund, as the section originally read, we think, only a change in name and not in substance. All moneys received by the county treasurer for lands sold by him, whether acting as trustee of the bond fund or trustee of the district, were and are required to be deposited in the county treasury for the same purpose, to wit: To the credit of the bond fund, to be used for the payment of principal and interest, etc. This establishes, we think, conclusively, that the Legislature intended no change in substance by simply changing the designation of the capacity in which the county treasurer should act. At all times he is acting for the same purpose, irrespective of his official title.

By the express terms of section 3480, supra, as amended in 1923, and also as amended in 1931, the county treasurer was made a trustee for a particular purpose, to wit: To hold the lands and sell the lands for the benefit of the bond fund. This was his duty, whether he acted under the title of trustee for the bond fund, or under the title of trustee for the district. In neither instance did he hold the title as owner, nor did the district, by reason of the change in the title of the county treasurer, become an owner of any of the lands deeded to the county treasurer as a trustee discharged from the trust obligation to see that the proceeds received from the disposition or management of the lands should be applied to the bond fund.

While a reclamation district is only a public agency or arm of the political organization of the state, and is performing only such functions, and endowed with such privileges and powers as may be accorded by the Legislature, it acts only in the capacity of a trusteeship, and never as an absolute owner or holder of the title placed in its charge by any of the provisions of section 3480, *supra*, either as it read in 1923, or as it read after being amended in 1931.

That the lands purchased by the county treasurer, and deemed to himself as trustee either of the bond fund or for the benefit of the district, constitute a trust for the benefit of the bondholders, seems to us explicitly stated in the terms used in section 3480, *supra*, as it originally read and as it now stands amended. All moneys collected by the treasurer, whether on account of installments, penalties, interest or sale of lands, must be by him paid into the treasury for the benefit of the bondholders.

In the case of *Rohwer v. Gibson*, 126 Cal. App. 707, 14 P.(2d) 1051, 1057, this court had occasion to examine the capacity in which the county treasurer acted and the character of funds collected by him, and the language used in that opinion we think applicable here, to wit: "In the recent case of *Meyers et al. v. City of Idaho Falls et al.* [52 Idaho, 81], 11 P.(2d) 626, 628, the Supreme Court of Idaho, in considering the nature of the fund collected on account of special improvement assessments, held as follows: 'Under the statute the municipality had the power to levy the entire cost of each improvement in one assessment. Its officers chose, however, to issue bonds for a ten-year period. The bonds succeed to the lien of the original assessment, and the assessments thereafter levied and collected are a "trust fund pledged by law for the payment of the bonds." *Jewell v. City of Superior* (C. C. A.) 135 F. 19. The only duty with which the city officials are charged is the levying of assessments and payment of the funds collected to the bondholders (*Moore v. City of Nampa* (C. C. A.) 18 F.(2d) 860), and there is no contention that the city has not fulfilled its obligation in this connection. The deficiencies which exist have arisen because the owners of certain parcels of property within each district failed to pay their assessments and general taxes, and the property reverted to the county, freed of the liens of the bonds. It follows, as hereinbefore stated, that the funds collected by the city by means of special assessments are trust funds, pledged to the payment of the bonds issued against each

district. Public improvement bonds are instrumentalities for the spreading of local improvement assessments over a period of years, and the maintenance of the lien therefor against the property benefited. Assessments collected are public funds, impressed with a trust in favor of the bondholders. *Jewell v. City of Superior*, *supra*.' In addition to the foregoing cases holding such moneys to be trust funds, we may also cite the following: *Conway v. City of Chicago*, 237 Ill. 128, 86 N. E. 619; *Wells v. Village of Wilmette*, 193 Ill. App. 30; *People v. Flynn*, 265 Ill. 414, 106 N. E. 961."

In the case of *State ex rel. Malott et al. v. Board of Com'rs of Cascade County et al.*, 89 Mont. 37, 296 P. 1, 19, the Supreme Court of Montana, having before it the questions we are now considering, held as follows: "It has been suggested by counsel for respondents that the county holds title to these lands as a trustee. While this matter is not directly before the court for determination, yet we observe in connection therewith that, when the county acquires these lands by tax deed on account of delinquent taxes and irrigation district assessments, it takes and holds such title as a trustee. The moneys derived from the sale of such lands are trust funds. The parties and entities interested in that fund are the school districts within the county, the county itself, the state to the extent of the taxes owing to it, the bondholders, and the holders of the debenture certificates. If the lands shall sell for an amount in excess of the taxes and assessments, then, after the payment of the general taxes, applying the well-established rules of equity, the remainder of the money should be turned over to the irrigation district, provided that sum does not exceed the total amount which would have been assessed against these lands on account of the bonds, had such lands not been transferred by tax deed. Thus the bondholders will have received the full value of all of their security."

The same case was again before the Supreme Court of Montana, 94 Mont. 394, 22 P.(2d) 811, 816, and the former holding of the court was reaffirmed in the following language: "But in view of the law it is the duty of the county commissioners to apply for tax deeds to enable the county to sell the land and to apply the proceeds as directed by law. *State ex rel. Malott v. Board of County Commissioners*, 86 Mont. 595, 285 P. 932. This is but one of the puzzles which may be expected to appear from time to time in the operation of Montana's *maladroit* ir-

rigation law. However, the rationale of the law compels the conclusion that, when irrigation district lands are struck off to the county and under statutory direction debenture certificates have been issued therefor, the county becomes a trustee and never discharges its trust until the lands are redeemed from sale, or, if not, until it sells the lands and distributes the proceeds agreeably to equity. (Cosman Case [74 Mont. 111, 238 P. 879, 40 A. L. R. 1344]; Malott Case, 89 Mont. 37, 296 P. 1.)"

The section of the Code and the cases which we have just cited we think clearly establish the following propositions: First, the trust consists of all moneys regularly paid upon installment calls; second, all moneys derived from the sales of land on account of delinquencies, including all moneys received on account of redemptions therefrom; third, all moneys derived from the resale of lands purchased by the treasurer as trustee for the bond fund, or as trustee for the district; fourth, the land itself, or the corpus of all parcels or tracts bought in by the county treasurer, and subsequently deeded to himself under the title of trustee for the district.

As we have heretofore stated, the designation of the title of the county treasurer of the capacity in which he acts, and which he uses in conveying land to himself, must be held immaterial, as the land so purchased and conveyed to the county treasurer constitutes a trust fund for the benefit of the bondholders, as set forth in section 3480, supra, as it read at the time of the issuance of the bonds by Reclamation District No. 108. If the change in title or in the name of the capacity in which the county treasurer is directed to act constituted a change in substance, and shifted any of the benefits or security from the bondholders to the district, then such provision would run counter to section 10 of article 1 of the United States Constitution, and would necessarily have to be held void as a violation of the original contract.

The security for the repayment of the money borrowed by the district, through the formality of the sale of bonds, includes all four of the propositions which we have set forth herein. Upon first impression we were led to the conclusion that the lien established by section 3480, supra, extended only to the amount of the assessment. The security, however, for the payment of the indebtedness, as we have just shown, extends not only to the moneys collected by voluntary payment of installment and sales of lands on

account of delinquency, but also to the lands to which title finally passes to the county treasurer in his capacity as a trustee. This clearly appears from the following language taken from the section as it originally read: "If no bid is made for any parcel at such sale equal to the amount of the installment delinquent thereon, with interest and penalty, the treasurer shall bid in and sell said parcel to himself and his successors in office, as trustee of the bond fund of said district, as purchaser, for the amount of said installment, interest and penalty." It then provided that in the event of no redemption after the lapse of one year, the treasurer shall execute a deed conveying the land to himself, following which it is provided that all moneys collected must be paid into the bond fund, and then the treasurer is authorized to sell the land, being limited as to the price only as to the amount of the installments, penalties, and interest chargeable against the land proposed to be sold. And further: In the event that followed the call for the final installment on account of the assessment, any land is still held by the county treasurer in his capacity as a trustee, the same shall be sold, and the treasurer is directed and commanded to "deposit the proceeds of such sale in the treasury of the main county, to the credit of the bond fund of the district."

In *Cooper v. Gibson*, 133 Cal. App. 532, 24 P.(2d) 952, 958, this court, in considering the nature and extent of the interest acquired by the county treasurer as trustee, said: "There seems to us a clear line of demarkation between the right of the district upon lands sold on account of a delinquent assessment and lands sold by the district after it has acquired a title thereto. When the lands have been sold and conveyed to the district, and title thus vested unconditionally in the district, it seems to us clear that the district has a right to sell the land for the highest possible sum that it can obtain for the same, and appropriate to its own uses and purposes every dollar received from such sale."

[5] We may here add that as to the land bought by the county treasurer as trustee for the district it is his duty upon sale thereof to obtain the highest possible market value, we think the proposition indisputable that whenever a trustee makes sale of trust property, his duty is to sell the land for all that it is reasonably worth, which includes at least the fair market value if economic conditions of the sale are such as to prevent the obtaining of the highest possible market val-

ue. This is a legal duty which a trustee is obligated to perform for the benefit of those for whom the property is held in trust.

In the opinion in *Cooper v. Gibson*, supra, this court in its opinion further said: "In determining the right of the district to moneys realized upon sales, the distinction must be clearly kept in mind between sales made following delinquent installments and sales made after title has become vested in the district or in the county treasurer as trustee for the district. In the one instance the district is entitled to have sale made for a specific purpose; in the other, to have sale made to obtain all the money possible."

We may further add that section 3480, supra, sets forth the minimum price in giving authorization to the trustee to make sale of lands to which he holds the title as trustee, but there is no attempt to fix the maximum price.

[6] Where redemption is made the rights and equities of the bondholder are satisfied by the payment of delinquent installments, penalties, interest, and costs, but where the title has passed to the county treasurer as trustee, and the rights of the particular landowner, the title to whose lands has thus passed to the trustee, no longer exist, the equities and rights of the bondholders, and also the equities and rights of all the other landowners in the district go to the extent of having the lands sold for their full value, in the event the value exceeds the limitation fixed in the section, below which the county treasurer as trustee is inhibited from making sale. This full value, or fair market value, to use the phrase found in some of the opinions, can only be secured where the right to purchase is open and free, upon the same terms to all persons having the desire and the ability to make purchase. A limitation upon this right or privilege, which must be free to all intending purchasers in order to obtain the fair market value for property about to be sold, is an infringement of the contract entered into between the district and the bondholders at the time of the sale and issuance of the bonds.

In *Hershey v. Cole*, 130 Cal. App. 683, 20 P.(2d) 972, this court had occasion to exhaustively review the cases establishing the principle that the law in existence at the time bonds were issued becomes a part of the contract, and thereafter cannot be changed without violating constitutional prohibitions. The authorities cited in that case are so numerous that reference thereto only need be made. We may, however, quote the follow-

ing from the opinion in the case of *Straus v. Ketchen* (Idaho) 28 P.(2d) 824, 834, to wit: "It is conceded by the parties that the bonds in question are contracts existing as between the landowners and the bondholders. Under the federal and state constitutional provisions above quoted, no law can ever be passed impairing the obligations of a contract, and no exception is made, consequently the contracts of a drainage district stand upon the same footing as those of individuals or any other agency. The Legislature cannot, under such constitutional prohibitions, authorize, under the police power of the state, the creation of a contracting agency and permit the contracting of obligations, and by the same power destroy its contracts and abolish its obligations. To permit the Legislature to do so would destroy the very essence of the constitutional prohibitions."

The law as it stood at the time of the issuance of bonds by Reclamation District No. 108 read into the contract the right to have sales made of all lands, the title to which should be acquired by the county treasurer as trustee, for not less than a certain sum, and likewise there was read into the contract the duty of the county treasurer as trustee to make sale of all of the lands to which he should acquire title as trustee, for not less than a certain sum, to wit, the amount of the delinquent installments, penalties, interests and costs.

It is true that in the authorization given to the county treasurer to make sale, the Legislature uses the word "may." This word, however, is not simply a permissive term. In the case of *County of Los Angeles v. State of California*, 64 Cal. App. 290, 222 P. 153, 156, this court quite exhaustively reviewed the authorities touching the proper interpretation to be given to the word "may." We there held as follows: "It thus appears that, while the word 'may' is primarily and ordinarily a permissive term and not peremptory, nevertheless, when the rights of the public or of other persons—in this case the state of California—are dependent upon the exercise of the power conferred, the word 'may' takes on the mandatory form, and that the performance of the act provided for is neither optional nor discretionary upon the person, or officer designated and authorized to perform the act." That no action has been instituted to compel the performance of this duty cannot be considered as a bar to, or as a waiver of the obligation set forth in the Code.

The terms of the contract being safeguarded by constitutional provisions, the attempt

of the Legislature in 1933 to change the terms thereof by fixing a definite price, irrespective of the market value of the lands held by the county treasurer as trustee for which the same shall be sold, must be held an infringement of the contractual obligations.

In *State ex rel. Malott v. Board of Com'rs of Cascade County*, supra, we find the following pertinent language: "At the time of the issuance of these bonds, the statute required that, upon the sale of these lands, the price obtained must be at least equal to the total of the assessments and general taxes, interest, and costs. Section 7246. For the reasons hereinafter set forth, the provisions of section 7246 may be changed as to the price at which the land is sold without violating the obligations of the contract, provided that price is the reasonable market value of the land, but a change in the law which empowers the board of county commissioners to sell these lands at any price bidden therefor, regardless of whether the price is the reasonable market value of such lands or not, is so obviously violative of the obligations of the contract as that no further comment is required. Included within the provisions of this act are all lands, title to which is taken by the county through tax deed. We hold that chapter 162, Session Laws of 1929, is unconstitutional in so far as it applies to the disposition of lands located within an irrigation district and having outstanding unpaid bonds or debenture certificates, as here. As to this class of lands, the act is unconstitutional. It is unconstitutional because the obligation of the contract with the bondholders is thereby impaired."

While the liability of every landowner is only to pay the amount of the assessment against the lands owned by him, and also while the lien extends only to the assessment, this statement is applicable only while the title to the lands involved is held by the owner. As we have shown, when the ownership of the land has passed by the deed of conveyance thereof to the county treasurer as trustee, a different principle is involved, and the security given by the statute becomes the land itself which, for the benefit of the bond fund, cannot be sold by the county treasurer acting under section 3480, supra, for less than the minimum sum mentioned therein. Every landowner in the district, as well as the bondholders, is entitled to have the land sold for its full market value, as the proceeds thereof are required to be credited to the bond fund, and "shall be used exclusively for the

payment of principal and interest of said bonds issued on such assessment, and of the principal and interest of any refunding bonds issued thereon."

That the lands sold by a county treasurer, the title to which has been acquired by him, when sold, go back into the taxing column and become liable for the payment of all subsequent installment calls on account of the assessment, does not lessen the right of any of the parties interested, nor does it change the provisions of the contract existing between the bondholders and the district, to have the lands sold for at least the minimum price named in section 3480, supra, when the treasurer is acting thereunder.

While the lands, the title to which is held by the county treasurer as trustee, may not be said to become security for the entire assessment spread against all tracts of land within the district, yet the Code provision expressly directs that all moneys received from the sale of such lands shall be paid into the bond fund and used for the purposes hereinabove stated.

It is true that none of the reclamation district acts give the bondholders a lien upon the lands of the district, or a right to look to the lands in the first instance, or the proceeds derived from sales thereof, other than as we have stated, and in this particular differ somewhat from the irrigation district laws of Montana which create a lien upon the lands within such district, in favor of the bondholders. This, however, does not lessen, or authorize the lessening of the security for the payment of the bonded indebtedness of the district, or permit a lessening of the security by a provision authorizing a diminishing of that security by the Legislature.

[7] By virtue of the fact that a reclamation district is simply an arm or agency of the state, all property owned by the district, as stated in the case of *People ex rel. v. Sacramento Drainage District*, 155 Cal. 373, 103 P. 207, is considered as property of the state. This, however, does not include lands in the ownership of private individuals situate within the boundaries of the district, nor does it change the trust character of the title taken by the county treasurer when lands are bought in by the county treasurer on the failure of others to bid therefor upon default in payment of installment calls. The state does not become the owner of the property as that term is usually understood. The property is taken in a trust capacity, and the agency created by the state is just as much bound by the law relating to trusteeships as a private in-

dividual would be, the purpose in both cases being the taking of the title for the purposes of executing the trust according to any contract that may have previously been executed. For this reason the statement in Reclamation District No. 70 v. Birks, 159 Cal. 233, 113 P. 170, which is in substance as follows: That the state has a right to sell its property, acquired through delinquent assessment sales, for a price which will satisfy in full all purported trusts in favor of the bondholders of the district, is not applicable to the lands held in trust where the proceeds received therefrom are directed to be applied to a particular purpose.

The distinction must also be kept in mind, as we have pointed out, between property owned by the district, as was true in the Birks Case, and lands held in a specified trust capacity. This distinction would necessarily have to be kept in view in considering the right of the state to remit penalties and forfeitures, and providing for redemption from sales without their payment, if that question were really before us for consideration.

In support of the petitioner's contention that penalties, interest, costs, etc., are no part of the assessment, and no part of the funds which are required to be used in the payment of bonds or accrued interest coupons, even though the Code provisions are that such items are to be credited to the bond fund, the cases of State ex rel. Dowling v. Butts, 111 Fla. 630, 149 So. 746, 89 A. L. R. 946, and Jones v. Williams, 121 Tex. 94, 45 S.W.(2d) 130, 79 A. L. R. 983, are cited. On first impression these cases were considered as controlling. A further consideration leads to the conclusion that both cases are inapplicable to the questions tendered for our consideration.

In the Dowling Case the questions tendered for consideration are succinctly stated in two paragraphs of the syllabi, to wit: "Statutes designed to facilitate adjustment and settlement of delinquent taxes through reasonable additional extensions, reductions, and privileges, and to encourage or facilitate the redemption of lands covered by tax sales certificates held by the state after the initial redemption period has expired, upon condition that current and future taxes on the same land shall be assessed and duly paid, do not violate a constitutional requirement of uniform and equal rates of ad valorem taxation upon just valuations of all taxable property. A statute permitting bonds, and their matured interest coupons, of a county or taxing district thereunder, to be used in redeeming

land sold to the state for unpaid taxes of certain years after the expiration of the original redemption period, does not deny the equal protection of the laws to taxpayers or creditors of counties or taxing districts." No question of the sale of lands after a deed had been executed conveying title appears to have been involved in that case. The privileges covered by the statute related to the extension of time for the redemption of lands where tax certificates had been issued and the period of redemption had expired.

No attempt appears to have been made by the statutes considered in the Dowling Case to extend an exclusive privilege to any individual or class of individuals, to buy property held in trust, the title to which had become vested in any district or arm of the state.

In the case of Jones v. Williams, supra, the court holds, and apparently supported by abundant authority, that the Legislature has power to remit penalties for tax delinquencies, including the power to remit interest charges imposed by statute in respect to delinquent taxes. In the instant case, as we have said, the power of the Legislature to remit penalties, interest, and costs is not involved. We may admit that penalties, interest, and costs are no part of the assessment, yet that it does not determine the issues presented. The penalties, forfeitures, interest, and costs are simply referred to, and as well, whatever income may have been derived from the trust property in fixing a definite price for which land held by the district in its trust capacity, after having acquired the title thereto, shall be sold, irrespective of the market value of the land, or of the persons who may become, or who may be desirous of becoming purchasers thereof, or who, by reason of contractual relations, are entitled to have the land sold for its full market value, or as expressed in a case hereafter cited, sold for its fair market value. This does not involve any remission of penalties, forfeitures, etc., in order to induce a redemption of property where the rights of the former land holder had been foreclosed by the divestiture of title, but is only used as a measure of fixing a sale price.

Whether the Legislature does or does not possess the power to remit penalties, interest, and costs does not determine the power of the Legislature to infringe upon the contract rights of those who look to the land for reimbursement for the moneys advanced by them in the purchase of bonds, enabling the district to carry out its reclamation projects.

That the Supreme Court of this state takes a somewhat different view of percentages,

penalties, etc., appears by the language used in the case of Long Beach City School District v. Payne, 219 Cal. 598, 28 P.(2d) 663, 665. Among other things, it is there said: "If taxes are not paid before delinquency on December 5th and April 20th of each year, the percentages for delinquency are added. These percentages are not 'penalties' as that term is generally known in law. County of Los Angeles v. Ballerino, 99 Cal. 593, 32 P. 581, 34 P. 329. They are the 'means provided for obtaining the tax itself by presenting an inducement to make voluntary payment on or before the day fixed for that purpose.'" The court then goes on to hold and set forth the purposes for which the penalties may be distributed. A somewhat different question is also presented by reason of the fact that section 3480, supra, in effect pledges the penalties as a part of the security for the payment of the bonded indebtedness of the district by providing that the penalties shall be paid into the bond fund.

That the rents, issues, and profits derived from trust properties follow the corpus and become a part of the trust funds is unquestioned, irrespective of the act of the Legislature adding section 3466a, supra, providing for the management of property, the title to which has become vested in the county treasurer for the benefit of the district, and the specifying therein of the application to be made of rents, issues, and profits. 65 C. J. pp. 690, 691.

[8] This brings us to a consideration of section 3466a, supra. That section provides, among other things, that: "No parcel of land shall be sold for an amount less than the fair market value thereof, as such value shall be ascertained by the Board of Trustees. One or more parcels of such land may be included in the same notice and sold severally at the time and place set forth in the notice."

Though questioned by the interveners, the following excerpts taken from the case of State v. Board of Commissioners of Cascade County, supra, would seem to uphold the constitutionality of such a procedure. We quote therefrom as follows: "In the brief of counsel for the relators it is said: 'A law in force when the bonds were issued became a part of the contract with the bondholders, the same as though incorporated in the bonds.' That this is a correct statement of the law may not be denied. This rule is based upon the provision of article 1, § 10, of the Federal Constitution, which provides in part: 'No State shall * * * pass any * * * Law impairing the Obligation of Contracts.' In the

case of United States ex rel. Von Hoffman v. Quincy, 4 Wall. 535, 550, 18 L. Ed. 403, the Supreme Court of the United States said: 'It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement.' In the same case it is further said: 'It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances.' See, also, Louisiana v. New Orleans, 102 U. S. 203, 26 L. Ed. 132; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 30 S. Ct. 40, 54 L. Ed. 144; Seibert v. United States, 122 U. S. 284, 7 S. Ct. 1190, 30 L. Ed. 1161; Moore v. Otis (C. C. A.) 275 F. 747; Moore v. Gas Securities Co. (C. C. A.) 278 F. 111, 123; Gibbons v. Hood River Irr. District, 66 Or. 208, 133 P. 772."

As said in the opinion just referred to, it is fair to assume that no purchaser could or can be found who is willing to pay more than the fair market price of the land offered for sale. If that is true, then no infringement would occur against any contractual rights. Such a sale, bringing the land back into the taxing column, would enhance rather than militate against the interest of the bondholders as well as the interest of the general public, and also every person interested in the financial condition of the district, no matter what the capacity. The same argument was made in the Cascade County Case as is presented here, and that argument is fittingly answered by the following excerpt found in the opinion, to wit: "The respondents insist that the lands may not be sold for an amount less than the general taxes, else section 6 of article 12, and section 39 of article 5 of the state Constitution, will be violated. These lands are not now subject to taxation, because owned by the county. If they may not be sold for an amount less than that represented by general taxes, then the very purpose of the Constitution and of the statutes is rendered ineffective by keeping this property from the tax rolls of the county, and thus, in effect, exempting it from taxa-

tion. As is said in the case of *City of Beatrice v. Wright*, 72 Neb. 689, 101 N. W. 1039, 1043: "To say that such property cannot be sold for what it is worth in the markets, even though for a less sum than the assessments against it, is to defeat the very objects of taxation, and lead to results the Constitution itself sought to avoid. Unless the property can be sold for its market value the result would be to exempt the property from all taxation for all time. This, of course, is an absurd result, and any construction leading thereto would be clearly inadmissible." To the same effect is *Fox v. Wright*, 152 Cal. 59, 91 P. 1005, and *Chapman v. Zoberlein*, 152 Cal. 216, 92 P. 188. The above decisions are based upon constitutional provisions substantially the same as that of our own, above mentioned."

While we hold that constitutional provisions prevent the Legislature from fixing a price at which the lands may be sold, irrespective of the market value, and limiting the persons who may be allowed to make purchase infringes upon constitutional rights, this does not stand as a bar to the application of a principle necessary to protect and really advisable to be put into effect to conserve the interests of all concerned by meeting a condition brought about not by the act of man, but by a superior force called an economic condition, which lessens the market value of the security back of the bonds, and which may be resorted to to effect their payment. When the market value of the lands becomes less than the amount of the delinquencies, penalties, costs, and forfeitures, it is only a verbal expression to say that the contract obligations have been changed by authorizing a sale at the fair market value, and thus bring the lands back into the taxing column, subject to payment of future installments, etc. The substance of the operation has not been changed by reason of any act of the Legislature authorizing such sale, but simply a recognition that a power superior to an act of the Legislature has rendered the provisions of section 3480, *supra*, impossible of application. If the security of the bondholder has been lessened, it is by the operation of superior economic forces over which the Legislature has no control. The recognition of a fact is not the creation of a fact; likewise, the recognition of a condition is not the creation of a condition.

By reason of what we have said we do not need to follow the argument of counsel relative to the classifications and the distinctions drawn in section 1 of chapter 313, *supra*, and that it gives a privilege to one, denied to

another, as what we have said we think sufficiently covers that issue.

[9] That chapter 613, *supra*, is discriminatory we think must be conceded. The calculations in the record before us show that for the small tract of land applied for by the petitioner he would be required to pay as the purchase price only the sum of \$92, whereas one holding an obligation of the district, and not a former owner of the particular tract of land sought to be purchased, would be required to pay approximately the sum of \$167.

Again, one class of persons is given two years within which to exercise an option of making purchase without making any compensation for the privilege so accorded. On the other hand, another class of persons interested in the financial condition of the district, by reason of holding its obligations, is absolutely prohibited from exercising the rights granted to such person under the provisions of section 3480, *supra*, as it originally read, and also as it now reads after being amended in 1931. This class of legislation has been condemned in the cases of *Hershey v. Cole*, *supra*, and *In re Cranberry Creek Drainage District* (*Jones v. La Vigne*, County Treasurer) 202 Wis. 64, 231 N. W. 588, 85 A. L. R. 242. The police power of the state does not authorize any such discrimination. *Straus v. Ketchen*, *supra*. That legislation changing the obligations of the contract of an improvement district after the issuance of the obligation is ineffectual is held in the recent case of *Dallas County Levee Imp. Dist. No. 6 v. Rugel* (Tex. Com. App.) 36 S.W. (2d) 188.

Our attention has not been called to, nor have we been able to find, any authorities upholding the right of a trustee to make a selection of purchasers of trust property. The law relating to trusts as we read it requires a trustee, when making sale, to sell to the highest responsible bidder.

Instead of bringing the land back into the taxing column, the record before us would indicate that the provisions of chapter 613, *supra*, have had a contrary effect. It appears that the title to 17,613 acres of land lying within the exterior boundaries of the district has passed to the county treasurer as trustee. Of this number of acres only one former landowner has made application to repurchase, and the tract applied for comprises less than 25 acres.

The suggestion that the title held by the county treasurer as trustee may be defective for the reason that prior delinquent sales were had under section 3480, *supra*, as amend-

ed in 1931, rather than as it read in 1923, is immaterial. If such is the case, an action to quiet title would be the proper remedy.

Basing the argument upon the decision in the case of Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, it is strongly contended that the provisions of chapter 613, supra, may be upheld as emergency legislation, and as such, within the police powers of the state. As we have heretofore pointed out, the police power of the state does not authorize the violation of any constitutional provisions. The economic condition of Reclamation District No. 108 has become such, and is such, that every one interested therein, whether as a landowner, or a bondholder, stands to suffer a great financial loss. The record shows that a considerable tract of land has been allowed to pass from private ownership to the ownership of the district. That indicates two facts. Such landowners have suffered great loss; also, that the holders of securities issued by the district have likewise had their securities greatly decreased in value. The man who owned the land has lost his title thereto, and the man who invested money in the bonds of the district in order to enable the district to reclaim the land, and in large measure gave it whatever value it ever had, apparently has lost the greater portion of his investment. Their rights are equal; they are both entitled to consideration. The apparent purpose of chapter 613, supra, is to bring their land back into private ownership and within the taxing column. To accomplish this purpose, as we have stated, the right to purchase must be made as free as possible, and inducements offered not simply to one class but to all classes. The granting of the privilege to one, and the denying it to another having equal if not greater interests, cannot be said to be in furtherance of a purpose to put the lands back either into private ownership or into the taxing column.

The Blaisdell Case to which we have referred does not grant any special privileges without requiring the yielding of compensation therefor. Again, there is a clear line of distinction between granting an extension of time to redeem land, or to withhold forfeiture through foreclosure proceedings by making compensation to the holder of the obligation, and legislation seeking to give one class of persons a special privilege of making purchase of trust property at a designated price, irrespective of its market value. In the one case contractual rights are only

postponed in their execution; in the other, they are absolutely set aside.

In order to make the legislation involved in this case compare with the holding of the court in the Blaisdell Case, provision should only have been made for extending the time of redeeming from delinquent sales prior to the divestiture of title, upon making compensation to the district therefor. We say "compensation to the District" because compensation to the financial condition of the district inures to the benefit of those who have advanced money on the face of the obligations of the district theretofore issued.

The legislation which we are considering compares more closely with that passed upon by the court in the case of Worthen v. Thomas, 292 U. S. 426, 54 S. Ct. 816, 78 L. Ed. 1344, 93 A. L. R. 173. In that case the Legislature of Arkansas attempted to exempt from execution, absolutely, moneys received on account of life, sick, accident, or disability insurance, irrespective of amount, and making such legislation retroactive. This act of the Legislature was held void by reason of being in violation of the United States Constitution, even though passed as an emergency measure.

As held in the case of State v. Board of Com'rs of Cascade County, supra, and as attempted to be provided for in section 3466a, supra, the financial condition of the district might properly be enhanced without violating any constitutional provisions, by authorizing the county treasurer of the district to sell any and all lands held in trust at its fair market value, even though that value is less than the fixed price specified in chapter 613, supra, to any one having the desire and ability to purchase. As set forth in the opinion in the Cascade Case, the bondholder is entitled to the market value of the trust property, and to nothing more. As we have said, that economic conditions have lessened that value would not render such sale void as an impairment of any contract. The opinion in the Cascade Case would lead to the conclusion that the police powers of the state might properly be exercised in the interest of the state in the bringing of the property back into the taxing column by authorizing a sale of all lands held in trust, at its fair market value at either public or private sale, thus placing the land where it would be subject to installment payments on the unpaid portion of the reclamation assessment, and at the same time yielding to the holders of the obligation of the district the full value of the lands involved.

That an emergency exists, and financial problems confront every reclamation district,

is undeniable. Such conditions and problems, however, do not justify the invasion of constitutional provisions.

From what we have set forth, without expressing any opinion upon the rights of the state to remit penalties, etc., which question is not strictly involved herein, we think the conclusion is unavoidable that chapter 613, supra, in its provisions violates section 10 of article 1 of the United States Constitution.

The writ is denied.

We concur: PULLEN, P. J.; THOMPSON, J.



5 Cal.App.2d Supp. 767

PEOPLE v. FORBATH.

Cr. A. 1168.

Appellate Department, Superior Court, Los Angeles County, California.

March 5, 1935.

1. Automobiles ☞333

Within ordinance forbidding registered owner to "allow," "permit," or "suffer" motor vehicle to park unlawfully, quoted words all imply owner's knowledge of unlawful parking, coupled with duty and power to prevent such parking (Pen. Code, § 20).

[Ed. Note.—For other definitions of "Allow," "Permission; Permit" and "Suffer," see Words & Phrases.]

2. Automobiles ☞353

In prosecution for overtime parking under ordinance, people held not required to prove that registered owner knew of ordinance or consciously intended to permit violation thereof (Pen. Code, § 20).

Appeal from Municipal Court of Los Angeles; R. Morgan Galbreth, Judge.

Elmer F. Forbath was convicted for violating an ordinance relating to the parking of motor vehicles, and he appeals.

Reversed and remanded.

Charles E. Sharritt and David Sokol, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

SCHAUER, Judge pro tem.

Subdivision 1 of section 39, Los Angeles City Ordinance No. 50515, as amended by Ordinance No. 73844, declares that "it shall be unlawful for any person * * * to allow, permit or suffer any vehicle registered in his * * * name as registered owner thereof, to stop, stand or park * * * upon * * * any street * * * in violation of any provision of this ordinance." The complaint in this case alleges, and the trial court impliedly found, that the defendant "did willfully and unlawfully * * * allow, permit and suffer a vehicle registered in his name as registered owner thereof to stop, stand and park * * * upon * * * a street * * * in the city of Los Angeles for a period of time longer than * * * allowed * * * by Section 28" of said ordinance.

At the trial, jury being waived, it was stipulated "that on the day alleged in the complaint the defendant was the registered owner of the motor vehicle in question; that on the said day the said motor vehicle was parked by some unidentified person" at a place and for a period in violation of section 28 of said ordinance, and that "the tag (was) left on car and filled out as required * * * and that the defendant has been notified as required" by section 39—2 of said ordinance. There was no other evidence as to possession or control of the vehicle, or knowledge of the same on the part of defendant.

[1] Upon this appeal defendant argues that such evidence is insufficient to support the conviction in that it fails to establish that he was personally the operator or otherwise knowingly participated in such overtime parking. Respondent on the other hand cites to us the case of *Commonwealth v. Ober* (1934) 286 Mass. 25, 189 N. E. 601, adopts its doctrine, and in effect asks us to declare this ordinance to mean, and to uphold it as constitutional in meaning, that a registered owner "at his peril must see to it that the rules and regulations are not violated by his act or by the act of another."

While their exact significance varies somewhat with the context of their use, we find that as definitive of a person's criminal conduct the words "allow" (*People v. Conness*, 150 Cal. 114, 121, 88 P. 821), "permit" (*Cramer v. Jenkins*, 82 Cal. App. 269, 276, 255 P. 877, 256 P. 444), and "suffer" (60 C. J. 990; *Black's Law Dict.* [3d Ed.] p. 1675), all imply knowledge of, coupled with a duty and power to prevent, the particular act or omission, the allowance, permittance, or sufferance of

which constitutes the offense. It is important to comprehend that it is not the substantive act or omission, as such, that is declared to be unlawful by ordinances of the type now before us—it is instead the willing toleration thereof, in breach of a duty with power to prevent, that is denounced as an offense. To violate such an ordinance, one need not actively either aid or abet the commission of the forbidden substantive act, but on the other hand one cannot “allow,” “permit,” or “suffer,” in the sense here intended, that which he has no power or duty to prevent, or concerning which, without criminal negligence, he has no knowledge.

Our conclusion as to the meaning of such words is founded not alone upon their independent philological significance; their use in the ordinance to define a crime suggests a broader and more impelling reason for holding that they possess the implications of knowledge and willfulness suggested. The fundamental statutory law of the land declares: “In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.” Section 20, Pen. Code. There can be no such union unless the act be done “willfully” or “knowingly.” To divest the words “allow,” “permit,” and “suffer,” as used in the ordinance, of their implication of knowledge and intent would not only destroy the union of act and intent, but would create a crime possessing neither of such elements.

Respondent refers generally to cases arising from the sale of intoxicating liquors to minors and sales of impure or adulterated food, points out that it has been held that lack of knowledge of minority in the one case and of the fact of impurity or adulteration in the other, constitutes no defense and asserts that “the principles involved in this case are closely analogous” to those of the cases referred to. It is true that between such cases an analogy may be postulated, but elucidation of the very theory which respondent invokes involves assertion of the principle which requires reversal of the judgment in this case. The theory so invoked is stated by respondent as follows: “It is within the legislative power to declare that knowledge of criminal character of act shall or shall not be necessary element of offense” (respondent’s P. & A., par. VIII). We find such proposition judicially elucidated in *People v. Dillon*, 199 Cal. 1, 9, 248 P. 230, 233, wherein the Supreme Court quotes (from *People v. O’Brien*, 96 Cal. 171, 31 P. 45) as follows: “It has been held that one who marries a second time under an honest but erroneous

belief that a decree of divorce which had been granted was valid is afforded no protection by the invalid decree, and that evidence of his good faith will be excluded. * * * The same principle is applied to many cases, such as selling intoxicating liquors to minors, abducting girls under a certain age, usurping an office under the belief that the usurper was truly elected * * * and the like.”

But preceding the foregoing quotation, we find a statement of the principle which it illustrates—the principle for want of compliance with which the proof in the case before us falls short: “When the statute plainly forbids an act to be done, and *it is done* by some person, the law implies conclusively the guilty intent * * *,” and again: (page 7 of 199 Cal., 248 P. 230, 232) “To render a person guilty of crime it is not essential to a conviction that the proof should show such person to have entertained any intent to violate law. * * * It is sufficient that *he intentionally committed* the forbidden act. * * * Section 20, Penal Code, is too clear to require juridical support. * * * [page 8 of 199 Cal., 248 P. 230, 232] ‘It is a familiar rule that to constitute crime there must be a union of act and intent; but our code provides that “the word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.”’” (Italics ours.)

The same proposition was discussed by the Supreme Court in *People v. McClenneen*, 195 Cal. 445, 469, 234 P. 91, and the following language used:

“The word “knowingly” imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission. * * *

“To make a person guilty of an offense, it is not necessary in every instance that such person should have a specific intent to violate law; it is sufficient that he *intentionally commits* the forbidden act.” (Italics ours.)

[2] The significance of the principle of law defined and illustrated in the foregoing quotations should now be apparent. Its application to the instant case simply means that in prosecutions under the ordinance in question it will be unnecessary for the prosecution to prove that the defendant knew that there was an ordinance prohibiting parking beyond a limited time in the district where

his car was parked, or that defendant, having such ordinance in mind, consciously intended to "allow, permit or suffer" violation thereof, but it does not mean that guilt can be established without proof that the defendant himself "intentionally committed the forbidden act."

In all of the cases referred to by respondent guilt (while the act of another may directly contribute thereto) is held to depend primarily and essentially upon the act of the defendant, not upon the act of a third person over whom the defendant is exercising no control. The conclusion in *Commonwealth v. Ober*, supra, would seem to support respondent's position, but the reasoning therein expressed is largely in accord with our views. The court there says that the law in that type of case "has put the burden upon the individual of ascertaining at his peril whether *his conduct* is within the scope of the criminal prohibition." (Italics ours.) To the extent that the burden is coincident with his own conduct (and this may involve responsibility for the conduct of others who are acting within his knowledge and control), we subscribe to such proposition, but we cannot thereon predicate the conclusion essential to sustain the judgment in this case, that the law "has put the burden upon the individual of ascertaining [*and controlling*] at his peril" his conduct *and the conduct of others*, out of his presence, without his knowledge, and over whom he has no control, "within the scope of the criminal prohibition."

To give such effect to the ordinance here involved would be to abolish intent, willfulness, and knowledge as material elements of the offense. It would mean that if a thief stole an automobile and parked or abandoned it in a limited parking area, the registered owner would thereby be rendered guilty of violating the ordinance and himself be made a criminal unless he or some one for him discovered and removed the potentially transgressor creating vehicle before the lapsation of the limited time tolled him from innocence to guilt. Whether the illegal parking was perpetrated by a thief or by one whose possession of the vehicle was lawful would in itself make no difference. While the fact that the registered owner had consented to the use of his car by the operator thereof upon the occasion of its illegal parking might be a pertinent circumstance, it would not be sufficient, in and by itself, to show his knowl-

edge of, control over, or consent to the unlawful act. Evidence of the mere fact that an automobile is registered in the name of a person does not constitute prima facie proof, in a criminal case arising out of the illegal operation of the car, that the registered owner was the operator on such occasion, that he had knowledge of, aided or abetted in, or consented to, the same. If the registered owner of an automobile can be made guilty of a misdemeanor for the illegal parking thereof by the act of a person done outside his presence and without his knowledge or consent, then we see no logical reason why such registered owner should not progressively be made criminally liable for the more serious offenses of speeding, reckless driving, violation of section 112, California Vehicle Act (St. 1923, p. 553, § 112, as amended), manslaughter and murder, all entirely independent of any knowledge, intent, or act of such owner and dependent exclusively upon the criminal whimsy of the itinerant driver.

We do not believe that the Constitution of our Nation has yet been swept away to the extent of permitting criminal guilt to be so speciously created and we come to the conclusion that unless defendant had knowledge that his automobile was being parked during the time that it was parked, and unless such parking was at least passively acquiesced in by him, he would not be guilty of violating the ordinance here concerned.

The evidence being insufficient to establish either such knowledge or acquiescence, the judgment must be, and is, reversed, and the cause is remanded to the municipal court for a new trial.

I concur: W. TURNEY FOX, J.

HARTLEY SHAW, Presiding Judge.

I concur in the decision and in all that is said in the opinion in regard to the construction of the ordinance involved and the sufficiency of the evidence to show a violation thereof. However, there is at least a suggestion in the opinion that any ordinance purporting to impose on the owner of a motor vehicle a criminal responsibility for its unlawful parking regardless of knowledge thereof or consent thereto on his part would be void. This question is not now before us, and I do not at this time express any opinion in regard to it.

2 Cal.2d 457

McALLISTER v. UNION INDEMNITY CO.
L. A. 14854.

Supreme Court of California.

Feb. 20, 1935.

1. Pleading ⚭406(9)

Where action for breach of employment contract was defended on ground that contract had been canceled, and plaintiff indicated willingness to amend complaint but trial proceeded and testimony was introduced as though all matters touching cancellation agreement were fully at issue, trial court *held* authorized to make finding as to amount due plaintiff under cancellation agreement; defendant having waived right to stand on failure to amend complaint.

2. Judgment ⚭251(1)

Word "issue," as used in statute providing that court may grant plaintiff any relief embraced within issue, is broader than complaint, where answer enlarges the same by introducing new matter (Code Civ. Proc. §§ 580, 590).

[Ed. Note.—For other definitions of "Issue," see Words & Phrases.]

3. Pleading ⚭432

Parties may voluntarily submit and try issue without any specific pleadings and thus be estopped from complaining thereat after judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by A. Hall McAllister against the Union Indemnity Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 32 P.(2d) 650.

Kidd, Schell & Delamer, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

PRESTON, Justice.

The question here is whether the relief afforded plaintiff was within the scope of the issues framed by the pleadings in the cause.

The amended complaint alleged breach of an oral contract for employment of plaintiff by defendant for one year from August 16, 1928, at an annual salary of \$11,000, through the wrongful discharge of plaintiff on September 15, 1928. The answer, among other things, alleged as a third separate defense

that said contract, if any, was mutually canceled on said September 15th. The court found this to be the fact, and that upon said mutual termination of the employment defendant agreed to pay plaintiff \$500 removal expenses and an amount equal to six weeks' salary at the rate of \$11,000 per annum; that the \$500 was paid but the salary amount was not paid. The court expressly failed to find on other issues, and judgment followed for plaintiff in the sum of \$1,683 and costs. Defendant appealed.

[1] It is appellant's contention that plaintiff sued on one contract (the contract of employment) and, without amending his complaint, recovered upon another (the cancellation contract), thus preventing the interposition of defenses available against the latter contract but not available against the former, and allowing plaintiff to recover by proving his own cause of action to be groundless and asserting a right to affirmative relief based upon an issue raised by his own denial.

This contention is technical and does not reach the case on its merits. Examination of the record shows that the evidence supports the findings, and there has been no miscarriage of justice. Appellant was not taken by surprise or misled to his prejudice by variance between pleadings and proof. At the close of plaintiff's case, at the time of denial of appellant's motion for nonsuit, plaintiff's counsel intimated his willingness to amend the complaint, whereupon the court stated: "You can consider it, and in the meantime, we will go ahead with the trial." The trial proceeded as though all matters touching said cancellation agreement were fully at issue, and testimony bearing upon it was freely introduced. No further effort was made to amend the complaint; the motion for nonsuit was not renewed, nor did appellant avail itself of an opportunity tendered by the court to move to strike out any portion of the answer.

In this situation it cannot be said that the trial court was not authorized to make findings upon said issues relating to the cancellation agreement. It is clear that appellant's right to stand upon the failure to amend the complaint was waived.

[2, 3] Section 580 of the Code of Civil Procedure provides that the court may grant a plaintiff any relief consistent with the case "made by the complaint and embraced within the issue."

"The word 'issue' as used in this Code section is broader than the complaint where the answer enlarges the same by introducing new matter. Section 590, Code Civ. Proc., and *Rogers v. Riverside Land, etc., Co.*, 132 Cal. 9, 64 P. 95. It is also true that the parties may voluntarily submit and try an issue without any specific pleadings and thus be estopped from complaining thereat after judgment. *Poledori v. Newman*, 116 Cal. 375, 377, 48 P. 325; *Mock v. Santa Rosa*, supra [126 Cal. 330, 58 P. 826]; *Sidler v. Bakersfield*, 43 Cal. App. 349, 185 P. 194; and *McDougald v. Hulet*, 132 Cal. 154, 163, 64 P. 278." *Baar v. Smith*, 201 Cal. 87, 98, 99, 255 P. 827, 832.

See, also, *Sprigg v. Barber*, 122 Cal. 573, 579, 55 P. 419; *Illinois, etc., Bank v. Pacific Ry. Co.*, 115 Cal. 285, 47 P. 60; *Peck v. Noe*, 154 Cal. 351, 97 P. 865; and *Gaffny v. Michaels*, 73 Cal. App. 151, 156, 238 P. 746.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANDGON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



2 Cal.2d 533

BROWN v. STATE BAR OF CALIFORNIA.
S. F. 15224.

Supreme Court of California.
Feb. 27, 1935.

As Amended March 1, 1935.

Rehearing Denied March 28, 1935.

Attorney and client ☞53(2)

Evidence held to warrant attorney's disbarment for misconduct in handling of clients' business and money.

In Bank.

Petition by Fabian D. Brown to review the recommendation of the Board of Governors of the State Bar that petitioner be disbarred, proposed by the State Bar of California.

Petitioner ordered disbarred and his name stricken from the roll of attorneys and counselors at law of the state of California.

Joseph A. Brown, of San Francisco, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a petition to review the recommendation of the board of governors of the State Bar that petitioner be disbarred.

Four separate proceedings were brought against petitioner before the local administrative committee. In the first case, Mrs. Katherine Egan, a former client of petitioner, charged him with misappropriation of funds. Petitioner was retained by her in June, 1931, for the purpose of filing certain actions to rescind contracts of sale of land and was paid \$125. She also paid him \$25 on account of another action. Petitioner claims that he mailed notices of rescissions promptly and thereafter negotiated for a settlement. But on a number of occasions, when questioned as to the progress of the actions, he told Mrs. Egan that the calendar was crowded, and the setting of the case for trial was consequently delayed. In August, 1932, more than a year after petitioner was employed and the money given him, Mrs. Egan discovered that he had not even filed the suits. Thereupon petitioner promised to repay the money advanced, and paid \$45 in cash, together with an indorsed check for a further sum, which check was not paid. In January, 1933, an order to show cause was issued directing petitioner to appear before the local administrative committee, and thereafter, a few days prior to the hearing, petitioner repaid the balance of the money.

Petitioner denies that he ever told Mrs. Egan directly that the matters were actually in court. We see no merit in this position. He did represent to his client that her case was delayed because the courts were crowded. That this was no excuse for failing to file the actions is obvious, and that it was a misrepresentation is equally obvious. Petitioner was clearly guilty of misconduct, consisting of misrepresentation and deliberate failure to perform the duties of his engagement after payment of his retainer.

In the second case, petitioner was also charged with misappropriation of funds by George Stiff, a client. In 1927 or 1928 petitioner was representing Stiff in a bankruptcy matter. It became necessary to bring an action to quiet title to land in Seattle, Wash. Stiff had paid at least \$155, and according to his testimony \$175, to petitioner for his services in the bankruptcy proceeding and for costs and attorneys' fees to be incurred in the Washington action. A. H. Wiseman, a member of the Seattle bar, was engaged by petitioner to prosecute the action there, petitioner

agreeing to remit the expenses and retainer. Wiseman, in May, 1929, requested that \$25 be sent on account. Petitioner claims he sent it but failed to produce either the check or letter of transmittal. Wiseman denies having received it. The record shows repeated requests by Wiseman for the remittance, and repeated excuses by petitioner. The only showing of payment occurs in connection with a letter dated November 4, 1932, but actually mailed January 4, 1933, over three years after the employment and just at the time these disciplinary proceedings were being carried on. The sum of \$30 was remitted at this time. During the pendency of these proceedings, petitioner made further payments: \$26 on March 31, 1933, and \$12 on May 5, 1933. Of the money remitted, \$25 was for settlement of the action with the adverse party. Stiff's testimony was that \$75 of the sum paid petitioner was to go to the Washington attorney. Whether we take his or petitioner's version as to the allocation of the money, it is sufficiently established that petitioner did not, for several years, remit any sum at all for this purpose, and that he was, in consequence, guilty of appropriating the money to his own uses.

A third complaint was made against petitioner by Fred A. Wisherop. One Elizabeth Gebhardt died in San Francisco in 1929, leaving money and securities of the value as ascertained in 1932, of \$1,191.43. The public administrator took charge of the estate. Wisherop appeared to be the sole heir. He engaged petitioner to represent him in securing distribution. During the early proceedings another attorney presented a claim against the estate by an alleged heir, which was later withdrawn as fictitious. However, this other attorney succeeded in making an arrangement subsequently with petitioner, whereby he was employed as "associate attorney" in the matter, for the sum of \$500. Wisherop signed an agreement to this effect. Whether he signed the instrument in blank or after completion is a matter upon which the record is conflicting, but he testified that he had never met this other attorney and understood from petitioner's statements that said attorney was representing another heir to the estate, whose claim was to be settled for \$500; that \$300 was to go for counsel fees to the two attorneys, the balance to Wisherop. Eventually, on January 3, 1933, the public administrator delivered a check for \$1,191.43 in favor of Wisherop, to petitioner. The latter had written authority to indorse Wisherop's name, and thereupon the check was

cashed. The "associate attorney" retained \$500; petitioner kept the balance and did not even notify Wisherop of the receipt of the money. In February, 1933, about six weeks later, Wisherop learned from other sources that the money had been received. He demanded his share. On October 27, 1933, while this proceeding was before the local administrative committee, and after a number of continuances had been given, petitioner paid Wisherop \$300, retaining \$391.43 for himself.

There is nothing in the record to show that petitioner's associate performed any services in exchange for the \$500 paid him, and no showing is made that the money went to a real or alleged heir. Petitioner, in thus permitting his client to be muled of this sum upon the representation that it was desirable in order to settle the estate, was guilty of a most serious breach of duty. The fact that he was able to secure Wisherop's signature to the authorization is certainly not a defense, and the fact that Wisherop was led to believe that his case was a weak one is still less a defense. If there were any important services performed by these attorneys, as a result of which the sole heir to an estate distributed by the public administrator received about one-fourth the sum ordered distributed to him, they certainly should be clearly set forth and justified. Moreover, petitioner's failure to notify Wisherop of the receipt of the money, and his failure to pay over any part of it until after the proceedings against him were in progress, cannot be justified under any theory, much less by the explanation, uncorroborated by any written or other evidence, that a "dispute" arose between petitioner and his client, as a result of which Wisherop refused to accept the money.

It is unnecessary to consider the fourth case against petitioner, which the local administrative committee found to rest on evidence too uncertain to justify a recommendation of disciplinary action. Each of the other three proceedings reveals grave misconduct by petitioner in the handling of the business and money of his clients. Upon such a record, the recommendation of disbarment must be approved.

It is therefore ordered that the petitioner, Fabian D. Brown, be and he is hereby disbarred from the further practice of law in this state, from and after the 31st day of March, 1935, and that his name be and it is hereby stricken from the roll of attorneys and counselors at law of the state of California, effective on and after said 31st day of March, 1935.

2 Cal.2d 527

PEOPLE v. MILLER.

Cr. 3833.

Supreme Court of California.

Feb. 27, 1935.

1. Homicide ☞140

Information charging attempt to murder named person *held* sufficient in absence of demurrer, as against contention that information should have alleged acts constituting attempt (Pen. Code, §§ 950, 951, 952, 1004, 1012).

2. Indictment and information ☞196(5)

Where information charged attempt to murder, but did not allege acts constituting attempt, any noncompliance with statute governing statement of offense *held* waived by failure to demur (Pen. Code, §§ 950, 951, 952, 1004, 1012).

3. Criminal law ☞44

Where crime remains unfinished and defendant is charged with attempt, there must be specific intent to commit crime and also direct ineffectual act done towards commission thereof.

4. Homicide ☞257(7)

Evidence that defendant, having threatened to kill constable's employee, was carrying .22-caliber rifle loaded with high-speed cartridge, and, having entered constable's land on which constable was working about 250 or 300 yards distant, with employee about 30 yards farther away, walked towards constable, and, after going about 100 yards, stopped and appeared to be loading rifle, but did not aim rifle at any time, and that employee fled and that defendant continued towards constable, who took possession of rifle without resistance, *held* insufficient to show "attempt" to murder employee (Pen. Code, §§ 217, 664, subd. 1).

[Ed. Note.—For other definitions of "Attempt," see Words & Phrases.]

5. Homicide ☞286(1)

In prosecution for attempt to murder, instruction that law presumes guilty intent from unlawful act *held* erroneous, since intent must be alleged and proved as a fact.

6. Homicide ☞285

In prosecution for attempt to murder, instruction that attempt exists if transaction has begun which would end in murder unless interrupted *held* erroneous, since intent is element to be proved.

In Bank.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Charles Miller was convicted of an attempt to commit murder, and he appeals.

Reversed.

Prior opinion, 35 P.(2d) 549.

Wayne P. Burke, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and Lilburn Gibson, Dist. Atty., of Ukiah, for the People.

SHENK, Justice.

The defendant was charged by information with assault with intent to murder one Albert Jeans. An amended information was filed charging the defendant with "attempt to commit murder, in that on or about the 17th day of March, 1934, in the county of Mendocino, State of California, he did, then and there, wilfully, unlawfully and feloniously, attempt to murder one Albert Jeans." The jury found the defendant guilty as charged in the amended information. The defendant has appealed from the judgment and from the order denying his motion for a new trial, assigning as grounds of appeal the insufficiency of the amended information to constitute a public offense, insufficiency of the evidence to sustain the verdict, and prejudicial error in the giving of certain instructions.

[1, 2] The defendant contends that the information should have included allegations of facts showing the overt or other acts constituting the attempt alleged. The defendant did not demur to the information. The claim is that the information does not comply with the requirements of sections 950, 951, and 952 of the Penal Code. Section 952 provides that the statement of the offense may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the defendant notice of the offense of which he is accused. We are satisfied that the matter contained in the statement of the charge was a sufficient compliance with the Code requirements. 31 Cor. Jur. 742; 14 R. C. L. 185. If there was any noncompliance with the sections in the respect claimed, the defect was waived by the failure to demur. Sections 1004, 1012, Pen. Code; *People v. Mead*, 145 Cal. 500, 503, 78 P. 1047; *People v. Perfetti*, 88 Cal. App. 609, 615, 616, 264 P. 318.

The evidence is practically without conflict. On the day in question, the defendant, somewhat under the influence of liquor and in the presence of others at the post office in the town of Booneville, threatened to kill Albert Jeans for the reason avowed by the defend-

ant that Jeans, a negro, had been annoying his wife and that the authorities would not take charge of the matter. Jeans had had some association with the defendant and other white people in that community for a number of years. On that day Jeans was employed on the hop ranch of Ginochio, who was the constable of Booneville. About 4 o'clock that afternoon, while Constable Ginochio, Jeans, and others were planting hops, the defendant entered the hop field of Ginochio carrying a .22-caliber rifle. Ginochio was about 250 or 300 yards away and Jeans about 30 yards beyond him. The defendant walked in a direct line toward Ginochio. When the defendant had gone about 100 yards, he stopped and appeared to be loading his rifle. At no time did he lift his rifle as though to take aim. Jeans, as soon as he perceived the defendant, fled on a line at about right angles to Miller's line of approach, but whether before or after the stooping motion made by the defendant is not clear. The defendant continued toward Ginochio, who took the gun into his own possession; the defendant offering no resistance. The gun was found to be loaded with a .22-caliber long, or high-speed, cartridge. The foregoing are the salient facts stated without the color afforded by the epithets and language used by the defendant in making his threats.

The main question presented by the appeal is whether the acts of the defendant legally constituted the offense of attempt to commit murder, and it must be said that an examination of the authorities casts considerable doubt on the question whether under the penal laws of this state the act charged has been committed in the case before us. Pen. Code, §§ 217, 664, subd. 1.

The authorities agree that it is impossible to formulate a general rule or definition of what constitutes an attempt which may be applied as a test in all cases, and that each case must be determined on its own facts with the assistance of general guiding principles. 8 R. C. L. p. 277; Stokes v. State, 92 Miss. 415, 46 So. 627, 21 L. R. A. (N. S.) 898. See People v. Stites, 75 Cal. 570, 575, 17 P. 693; People v. Lanzit, 70 Cal. App. 498, 504, 505, 233 P. 816.

[3] Where the crime remains unfinished and the defendant is charged with attempt, two important elements are essential: A specific intent to commit the crime (People v. Mize, 80 Cal. 41, 22 P. 80), and a direct ineffectual act done towards its commission (People v. Murray, 14 Cal. 159; Ex parte Floyd, 7 Cal. App. 588, 590, 95 P. 175; People v. Petros, 25 Cal. App. 236, 244, 143 P. 246;

18 R. C. L., p. 277). Mere intention to commit a specified crime does not amount to an attempt. People v. Stites, supra, page 575 of 75 Cal., 17 P. 693. Preparation alone is not sufficient. "Something more is required than mere menaces, preparation or planning." 30 Cor. Jur. 13. "The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made. * * * Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." 8 R. C. L. pp. 278, 279. "There must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." Wharton's Criminal Law (12th Ed.) vol. 1, p. 280. It is also stated in the same work at page 292 of volume 1: "If the preparation is not of itself indictable, or will not of itself, if uninterrupted extraneously, result in crime, the weight of reasoning is that it cannot be made per se indictable as an attempt. For, first, there is no evidence as a general rule, that can prove that a particular preparation was designed for a particular end. Thus a gun may be bought as well for hunting as for homicide. Nor can we lay down any intelligible line between preparations which betray more clearly and those which betray less clearly a felonious purpose. Secondly, between preparation and execution there is a gap which criminal jurisprudence cannot fill up so as to make one continuous offense. There may be a change of purpose, or the preparation may be a vague precautionary measure, to which the law cannot append a positive criminal intent, ready to ripen into guilty act." In the discussion of the requirement of causal relationship between the attempt and the act attempted, the author points out the distinction between conditions and causes. He says: "To enable a gunshot wound to be inflicted, an almost innumerable series of conditions is necessary. It is necessary that the gun should be procured by the assailant. * * * It is necessary that the assailed should be in a position to be shot, and that the assailant should be in a position to take aim. All these are necessary conditions to the shooting without which the shooting could not take place. No one of them, however, is in the eye of the law the cause. A juridical cause is such an act, by a moral agent, as will apparently result, in the usual course of natural events, unless inter-

rupted by circumstances independent of the actor, in the consequence under investigation." 1 Wharton's Criminal Law (12th Ed.) p. 287.

We are mindful of the fact that language appearing in *Stokes v. State*, 92 Miss. 415, 46 So. 627, 629, 21 L. R. A. (N. S.) 898, that, "whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt," has received approval. *People v. Lanzit*, 70 Cal. App. 498, 507, 508, 233 P. 816; 8 R. C. L. p. 279; 13 R. C. L. p. 798. The statement, however, that slight acts in furtherance of the design will be sufficient is not in conflict with the usual statements of the tests applied to aid in drawing the line at the point where preparation leaves off and execution has commenced. It still presupposes some direct act or movement in execution of the design, as distinguished from mere preparation, which leaves the intended assailant only in the condition to commence the first direct act toward consummation of his design. The reason for requiring evidence of a direct act, however slight, toward consummation of the intended crime, is, as pointed out by the author in Wharton's Criminal Law, that in the majority of cases up to that time the conduct of the defendant, consisting merely of acts of preparation, has never ceased to be equivocal; and this is necessarily so, irrespective of his declared intent. It is that quality of being equivocal that must be lacking before the act becomes one which may be said to be a commencement of the commission of the crime, or an overt act, or before any fragment of the crime itself has been committed, and this is so for the reason that, so long as the equivocal quality remains, no one can say with certainty what the intent of the defendant is. As stated in *United States v. Ford* (D. C.) 34 F. 26, 27, "the intention of the actor can alone be clearly ascertained by the movements which he has made to complete his design."

[4-6] In the early case of *People v. Murray*, 14 Cal. 159, a conviction of attempt to contract an incestuous marriage was reversed. In discussing the distinction between preparation and attempt, it was said: "To illustrate: a party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation and not an attempt. For the preparation, he may be held to keep the peace; but he is not chargeable with any attempt to kill." In the case of *Stokes v. State*, *supra*, it was

held that, the intent being clear, the taking of a loaded gun and going in search of the intended victim constituted an attempt. Justification for the decision in that case may be said to lie in the possibility of the jury's finding under the facts there involved that the preparation for the assault was without any equivocality, and, the intent thus being proved, the preparation was sufficient to constitute the overt act. The same reasoning applies to the cases of *People v. Lanzit*, 70 Cal. App. 498, 233 P. 816, wherein the defendant had prepared a bomb for the purpose of killing his wife; and *People v. Stites*, 75 Cal. 570, 17 P. 693, wherein the defendant had prepared to place dynamite on railway tracks, and in both of which convictions were upheld. These cases illustrate the small class of cases where the acts of preparation themselves clearly indicate the certain unambiguous intent and suffice to constitute the attempt. In the present case, up to the moment the gun was taken from the defendant, no one could say with certainty whether the defendant had come into the field to carry out his threat to kill Jeans or merely to demand his arrest by the constable. Under the authorities, therefore, the acts of the defendant do not constitute an attempt to commit murder. Furthermore, in such a case an instruction to the jury that guilty intent may be presumed from an unlawful act is prejudicially erroneous. The court instructed the jury; "The law presumes a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another." This instruction is not proper in a case involving the charge of attempt to commit murder where intent is an essential element to be alleged and proved as a fact, and may not rest upon a presumption. *People v. Wilson*, 117 Cal. 688, 693, 49 P. 1054; 13 Cal. Jur. pp. 753, 754, and cases cited; *Morgan v. State*, 33 Ala. 413. Likewise, because intent is an element which must be proved, an instruction is erroneous which tells the jury that, "if the actual transaction has commenced which would have ended in the crime of murder, if not interrupted, there is an attempt to commit the crime." *People v. Mize*, 80 Cal. 41, 22 P. 80. The distinction in this respect is stated in 2 Bishop's Criminal Law, § 741, and quoted in the last-cited case: "The wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of attempt to commit murder." *People v. Weston*, 32 Cal. App. 571, 578, 163 P. 691. The instructions containing the erroneous matter

were prejudicial to the defendant's rights in the present case.

The judgment and order are reversed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; THOMPSON, J.



2 Cal.2d 324

In re LAVINE.
S. F. 15183.

Supreme Court of California.
Feb. 28, 1935.

In Bank.

On rehearing.

Rehearing denied.

Prior opinion, 41 P.(2d) 161.

Morris Lavine, of Los Angeles, in pro. per.

Norman S. Sterry, Louis W. Myers, and Philbrick McCoy, all of Los Angeles, for respondent State Bar.

PER CURIAM.

The petition for a rehearing herein is denied.

The opinion is modified by striking therefrom the fourth sentence in the first paragraph appearing in volume 41 P.(2d) at page 161, reading as follows: "No claim is here made that the pardon was the result of a subsequent showing of petitioner's innocence of the crime."



2 Cal.2d 569

PETERSEN v. LEWIS.
L. A. 14840.

Supreme Court of California.
Feb. 28, 1935.

1. Automobiles ⇨168(1), 171(9, 12)

One driving automobile at unlawful speed and driver making left turn to left of center of street intersection, without first giving required arm signal, were guilty of negligence

per se (St. 1925, p. 413, § 130; St. 1929, p. 541, § 129; St. 1931, p. 2120, § 113).

2. Automobiles ⇨242(7)

Burden was on plaintiff in action against automobile driver, making left turn to left of center of street intersection without first giving required arm signal, for injuries to guest in following automobile when struck by automobile approaching from opposite direction, to prove that defendant's negligence was cause of injury (St. 1925, p. 413, § 130; St. 1929, p. 541, § 129; St. 1931, p. 2120, § 113).

3. Automobiles ⇨245(60)

Evidence in action against automobile driver, making left turn inside center of street intersection without first giving required arm signal, for injuries to guest in following automobile when struck by third automobile approaching from opposite direction, held insufficient to take to jury question whether defendant's negligence was proximate cause of accident (St. 1925, p. 413, § 130; St. 1929, p. 541, § 129; St. 1931, p. 2120, § 113).

SEAWELL, J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Leonard J. Petersen against J. P. Lewis. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, 32 P.(2d) 641.

Ray W. Hays and Walter Sorensen, both of Fresno, for appellant.

Conley, Conley & Conley, W. M. Conley, Philip Conley, and Matthew Conley, all of Fresno, for respondent.

WASTE, Chief Justice.

This cause was transferred to this court for hearing after decision and judgment in the District Court of Appeal. The facts, so far as material here, are sufficiently and clearly stated in the opinion prepared by Mr. Justice Marks of that court, and are as follows:

"The plaintiff was very seriously injured in an automobile collision in or near the intersection of McCall avenue and Gaither street in the city of Selma. The accident occurred at about 5 o'clock on the afternoon of July 29, 1931. On motion of the defendant the trial court instructed the jury to return a verdict in his favor. Judgment was entered upon this verdict, and this appeal followed.

"McCall avenue, which has a pavement twenty feet in width in its center and is forty

feet between curbs, runs north and south, and Gaither street intersects it at right angles. In both directions from the intersection, McCall avenue runs through a 'residence district.' Section 28½, Cal. Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 510). The intersection was an obstructed one where the driver of a vehicle approaching it did not have a clear and uninterrupted view of the traffic for a distance of two hundred feet on the intersecting street for the last one hundred feet of his approach to it. Section 113, Cal. Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2120). There were no 'turning markers' at the intersection.

"Just prior to the accident the defendant was driving his automobile, a coach with a two-wheel trailer attached, northerly on his right-hand side of McCall avenue at a lawful rate of speed. The coach was sixteen feet in length and the trailer ten and one-half feet long." The plaintiff was riding as a guest in an automobile driven by Sidney Jensen which was following the defendant's car north on McCall avenue. Jensen was driving at a lawful rate of speed and on his own right-hand side of the street. About 20 feet south of the intersection, defendant gave the arm signal for a left turn onto Gaither street. "He started his left turn as soon as he reached the south line of Gaither street and completed it without passing to the right of the center of the intersection, and then parked his vehicles on the north side of Gaither street just west of McCall avenue.

"The defendant testified that when he was about forty feet south of the intersection he saw a car about three hundred feet north of Gaither street, approaching on McCall avenue. When he reached the intersection, and about the time he started his left turn, he saw that it was about one hundred fifty feet from the intersection and was being driven at a speed of forty-five or more miles an hour. This car was being driven by Melvin Pelletier. The defendant proceeded with his turn at a speed of about ten miles an hour, and heard, but did not see, the collision between the Pelletier automobile and [the Jensen car] the one in which the plaintiff was riding. The defendant did not know a car was following him.

"* * * The plaintiff was so seriously injured in the accident that he had no recollection of it. Pelletier died the next morning. The plaintiff relied upon the testimony of Jensen for a description of the accident.

"Jensen testified that, with the plaintiff riding as his guest, he was following the Lewis

car at a distance of about seventy-five feet in traveling north on McCall avenue; that Lewis reduced his speed before entering the intersection and that the Jensen car was about forty feet back of the Lewis trailer when Lewis started his left turn; that Jensen's view of the west half of McCall avenue was cut off by the body of the Lewis coach; that when Lewis had made sufficient of his left turn so that the coach body had crossed the center line of McCall avenue, Jensen saw the Pelletier automobile for the first time; that it was then on the west half of McCall avenue about twenty feet north of the north line of the intersection; that at that time the rear of the Lewis trailer had not crossed to the west side of the center line of McCall avenue; that such line passed under the trailer; that Pelletier was driving 'fast' and swerved his car sharply [to the left] onto the east side of McCall avenue and then swerved it sharply towards the center; that Jensen swerved his car to his right until his right wheels were off the pavement; that the Pelletier automobile struck the Jensen car on its right front and the injuries to plaintiff followed."

[1] From this record it appears that Pelletier was driving his automobile at a rate of speed in excess of that permitted by section 113 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2120) as in effect at the time of the accident. It also as affirmatively appears that the defendant Lewis violated the provisions of section 129 of the California Vehicle Act (St. 1923, p. 558, as amended by St. 1929, p. 541) in passing to the left of the center of the intersection, and of section 130 of the same act (St. 1923, p. 558, as amended by St. 1925, p. 413) in failing to give the proper arm signal over the required space before commencing his left turn. It therefore must be conceded that both of these drivers were guilty of negligence per se. The driver of any vehicle upon a public highway, before starting, turning, or stopping such vehicle shall first see that such movement can be made in safety, and, if it cannot be made in safety, shall wait until it can be made in safety. California Vehicle Act, § 130. The question on this appeal therefore resolves itself into this: Did the negligence of either of the drivers proximately contribute to the accident? So far as this cause is concerned, if the action of defendant Lewis was the proximate cause of the accident, the trial court was in error in granting the motion for a directed verdict.

[2, 3] The evidence here is direct and in no way circumstantial. On the established facts,

we are of the opinion that the directed verdict was properly ordered. Notwithstanding the negligence per se of the defendant Lewis and the deceased Pelletier, we are not convinced that such negligence was the proximate cause of the injury. Such a conclusion can only be reached through surmise and speculation. The burden of proving that such negligence was the cause of the injury was upon the plaintiff. By proving the negligence of the defendant without in some way fastening that negligence to the injury, a case is not made out. *County of Alameda v. Tieslau*, 44 Cal. App. 332, 337, 186 P. 398, and cases cited therein. Assuming, only for argument, that Pelletier, who is not here to answer for himself, was negligent, and that his negligence may have been the proximate cause of the collision between the automobiles, and the resulting injury to the plaintiff, a careful analysis of the evidence and a thorough study of the details of the accident fail to show such a proximate or necessary connection between the negligence of the defendant Lewis and the happening of the accident as to render him liable for plaintiff's injuries. *Puckhaber v. Southern Pacific Co.*, 132 Cal. 363, 364 et seq., 64 P. 480. We deem unnecessary further citation of authorities on this rule of law so well established in this jurisdiction.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; THOMPSON, J.; PRESTON, J.

SEAWELL, Justice.

I dissent.

It seems clear that the order of the District Court of Appeal, Fourth Appellate District, reversing the order of the superior court which directed the return of a verdict in favor of the defendant is sustained by the decisions of this court defining concurrent liability in personal negligence cases. The evidence in this case justifies the reversal of the order directing said verdict.

The facts are simple. The situs of the accident was within a residential section of the city of Selma at the intersection of McCall and Gaither streets. McCall street extends northerly and southerly. Gaither street intersects it at right angles. Melvin Pelletier was traveling southerly on the right-hand side of said street approaching said intersecting street at a rate of speed estimated by the defendant at 45 miles an hour and by another person who was less qualified to judge of said rate of speed at 60 miles per hour. Defendant Lewis was traveling northerly to-

ward said intersecting street on the right-hand side of McCall street. He was driving a Durant coach to which a trailer was attached. The coach and trailer measured 27 feet in length. Plaintiff was the guest of Sid. Jensen, the latter being the owner and driver of a Ford coupé. Mr. Jensen had been following the defendant's car and trailer for some three or four blocks at a distance of about 75 feet behind said car and trailer, both going at an even speed of approximately 15 miles per hour. The defendant, nevertheless, had not observed that any one was behind. When within 20 feet of the southerly line of Gaither street, defendant, according to his own testimony, put out his hand indicating a left-hand turn. He then proceeded to turn to the left. This was a violation of the California Vehicle Act, § 130 (St. 1923, p. 558, as amended by St. 1925, p. 413), which requires that a driver shall give the proper signal continuously during the last 50 feet traveled by the vehicle before turning. Not only did the defendant fail to give the signal for the period required by law, but he admits that at the time he crossed the Gaither street line and began to turn to the left and cut the intersection he did not take heed as to the position of the Pelletier car, which he had previously observed to be apparently 150 feet north of the intersection and traveling at the rate of 45 miles an hour or better, as against less than 15 for defendant. The defendant again violated the California Vehicle Act by failing to pass to the right of the center of the intersection of said streets. He said he believed he could pass ahead of Pelletier safely. He had a clear view at all times of Pelletier's car, which was approaching the intersection at a rapid speed. Jensen's view was obstructed by the Lewis coach and trailer until it came within 20 feet of the Pelletier car immediately before the crash. The Pelletier car had been turned out of its course in order to avoid hitting the trailer which had not cleared the westerly half of McCall street, the side upon which Pelletier was traveling. The evidence is that a portion of the coach had not passed entirely from McCall street when Pelletier made a sudden turn to the east to avoid hitting said trailer which was passing south of the center of the intersection. Had Lewis observed the law and made the proper turn, it is highly probable that no injury would have occurred. It seems reasonably certain that the plaintiff would not have been injured. Lewis would in all probability have paused and not attempted to cross in front of the Pelletier car. To so conclude is not indulging in mere speculation, but the deduction of a

reasonable probability which may be predicated upon the probable and reasonable conduct of persons under the situation shown by the evidence to have existed. The plaintiff and the driver of the car in which he was riding were absolutely without fault. The defendant was also guilty of negligence in violating section 130, subd. (a), California Vehicle Act, which provides: "The driver of any vehicle upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it can not be made in safety, shall wait until it can be made in safety; then, if the operation of any other vehicle may reasonably be affected by such movement, the driver shall give a signal plainly visible to the driver of such other vehicle of the intention to make such movement."

Defendant admits that he did not know the position of Pelletier at the time he commenced to make the left-hand turn. He testified that he observed the Pelletier car just after he started to make the left turn and he observed "that it was coming fast." Defendant was in a position to have had a full view of the entire situation. He noted the speed at which Pelletier was traveling, and notwithstanding all that he saw and knew he cut the intersection and brought about a perilous situation which caused Pelletier to veer to the east in order to avoid colliding with the trailer which resulted in an innocent traveler receiving a badly fractured skull, a broken leg, and wounds and bruises.

The defendant was entitled to the protection which the observance of the law is designed to afford travelers. The question then is whether or not the negligence of the defendant, independently or concurrently with the negligence of Pelletier, proximately contributed to the injuries of plaintiff.

There can be no doubt and the majority opinion admits that defendant was guilty of negligence. I cannot hold, as a matter of law, that the intervening negligence of Pelletier, assuming he was negligent, broke the line of causation. The jury could have reasonably found, from the above facts, that the negligence of defendant continued up until the time of the accident, and was at least one of the proximate causes thereof. Assuming that Pelletier was negligent and that his negligence was one of the proximate causes of the accident, that would, of course, not relieve the defendant from liability if his negligence also contributed to the accident and was one of the proximate causes thereof. Be-

fore it can be held that the intervening negligent act of Pelletier broke the line of causation, it must appear that defendant's negligence was so disconnected in time and nature as to make it plain that the damage occasioned was in no way the natural or probable consequence of the original negligence of defendant. *Springer v. Pacific Fruit Exchange*, 92 Cal. App. 732, 739, 268 P. 951. This was a question of fact that should have been left to the jury. See, also, *Pastene v. Adams*, 49 Cal. 87; *Merrill v. Los Angeles Gas & Electric Co.*, 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; *Sawyer v. Gas Co.*, 206 Cal. 366, 274 P. 544. One of the most recent statements of the rule is to be found in *Lacy v. Pacific Gas & Electric Co.*, 220 Cal. 97, 98, 29 P.(2d) 781, 782, where it is stated:

"The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury. * * * In such a case either of the negligent persons would be liable to the plaintiff for his injuries."

I think the principle there enunciated is clearly applicable to the facts of this case and that it was therefore error to take this case from the jury.



2 Cal.2d 576

PACIFIC NAT. AGRICULTURAL CREDIT CORPORATION v. WILBUR et al.

Sac. 4917.

Supreme Court of California.

Feb. 28, 1935.

Rehearing Denied March 29, 1935.

1. Chattel mortgages ⇨229(3)

In chattel mortgagee's action for conversion of sheep, evidence required finding that sheep taken by defendant from chattel mortgagor in settlement of defendant's claim against chattel mortgagor were covered by chattel mortgage.

2. Fraudulent conveyances ⇨141

Oral agreement between conditional seller and buyer whereby buyer sought to substi-

tute mortgaged sheep for those originally covered by conditional sales contract and previously sold by buyer held void as to chattel mortgagee of sheep not advised of agreement, where not accompanied by immediate change of possession (Civ. Code § 3440).

3. Chattel mortgages ⇨229(1)

Original chattel mortgagee who pledged mortgage held "real party in interest," entitled to bring action for conversion of mortgaged sheep, where mortgage was reassigned to original mortgagee before institution of action.

[Ed. Note.—For other definitions of "Real Party in Interest," see Words & Phrases.]

4. Chattel mortgages ⇨241

Reduction in new chattel mortgage of interest rate called for by prior chattel mortgage does not indicate intention to create new obligation and abandon lien of prior chattel mortgage.

5. Chattel mortgages ⇨241

Chattel mortgage including sum remaining due on prior chattel mortgage and additional advances and covering some of sheep covered by prior mortgage and additional sheep constituted renewal of prior mortgage, rather than payment thereof releasing lien created thereby, notwithstanding record of prior mortgage was marked "discharged" after execution of later mortgage, so that mortgagee was entitled to recover balance unpaid on prior mortgage for conversion of sheep covered thereby and taken by defendant before execution of later mortgage.

6. Chattel mortgages ⇨47

Description in chattel mortgage, as against third persons, must point out subject-matter so that third persons may identify chattels covered, but need not be so specific that property may be identified by it alone, if such description suggests inquiries or means of identification which will disclose property covered.

—◆—
In Bank.

Appeal from Superior Court, Yuba County;
K. S. Mahon, Judge.

Action by the Pacific National Agricultural Credit Corporation against R. A. Wilbur and Hazel Hoke Smith, wherein the first-named defendant defaulted. From an adverse judgment, plaintiff appeals.

Reversed.

Prior opinions, 34 P.(2d) 212; 35 P.(2d) 206.

George R. Freeman, of Willows, and Erling S. Norby, of Marysville, for appellant.

Huston, Huston & Huston, of Woodland, and Rich, Weis & Carlin, of Marysville, for respondent.

PER CURIAM.

A hearing was granted in this case, after decision by the District Court of Appeal, Third Appellate District. Upon further consideration, we adopt the following portion of the opinion of Mr. Justice Plummer as the opinion of this court:

This action was begun on August 27, 1931, to recover from the defendants the sum of \$7,642.94, for and on account of the alleged conversion by the respondent of 1,439 head of sheep. The defendant Wilbur defaulted, and the action thereafter was prosecuted against the respondent Hazel Hoke Smith.

The undisputed facts disclosed by the record show that on the 5th day of July, 1927, the defendant Wilbur purchased from the defendant Smith a band of sheep consisting of 1,415 ewes and 24 rams on a conditional contract of sale; title to remain in defendant Smith until the sheep were all paid for. This contract was not recorded until July 8, 1930. On the 5th day of August, 1929, the defendant sold all of the sheep referred to in the contract of sale, together with the increase thereof, while he was still indebted to the defendant Smith under the conditional contract of sale. The sheep were sold without the knowledge or consent of the defendant Smith. After the sale the defendant Wilbur owned approximately 1,400 head of sheep. At this period Wilbur owed no money to any one, save and except to the defendant Smith. The defendant Wilbur suggested to the defendant Smith that the 1,400 head of sheep he then had be substituted for the sheep he had purchased from her under the conditional contract of sale. The defendant Smith agreed to this substitution, but no written contract was executed between them in relation thereto, nor was the original contract of sale modified in any particular. Wilbur continued to hold possession of the 1,400 head of sheep just as he formerly had. The sheep were not in fact turned over to the possession of the defendant Smith; the transaction consisting solely of the oral agreement between the two parties. The plaintiffs in this action had no knowledge of such oral agreement until long after the transactions hereinafter set forth.

During the months of September and October, 1929, Wilbur purchased approximately 4,486 head of sheep from various sources. The money for these purchases was furnished

by the plaintiff under an agreement with Wilbur. At the close of 1929 Wilbur had on hand the 1,486 head of sheep just referred to, and also the 1,400 head of ewes mentioned in the oral agreement between the parties. On March 18, 1930, the defendant Wilbur and his wife made, executed, and delivered to the plaintiff a promissory note in the sum of \$25,000, with interest thereon at the rate of 7 per cent. per annum. This note was due November 9, 1930, and, to secure the payment thereof, executed and delivered to the plaintiff a chattel mortgage on the sheep in his possession, which chattel mortgage included the 1,400 head of sheep referred to in the oral agreement between the parties.

On the 25th day of July, 1930, the defendant Smith, after giving notice to the defendant Wilbur, with her agents, went through the sheep described in the chattel mortgage dated March 18, 1930, and selected 1,439 head of sheep, without any reference being made as to whether the ones selected were or were not the sheep possessed by Wilbur at the time of the oral agreement herein referred to. These sheep were set apart by themselves, but remained on premises controlled by Wilbur until after the 15th day of August, 1930. Subsequently the defendant Smith sold the sheep, and they were removed by the purchaser. Between July 25, 1930, and September 15, 1930, Wilbur purchased various bands of sheep from different sources with funds furnished by the plaintiff. On September 13, 1930, the defendant Wilbur and his wife executed and delivered to the plaintiff a second chattel mortgage for the sum of \$25,000 bearing interest at the rate of 6 per cent. per annum. At the time of the execution of this mortgage the defendant Wilbur was still indebted to the plaintiff in the sum of \$7,042.94 on the note dated March 18, 1930. The second note and mortgage included the sum remaining due upon the first note and mortgage, which, with additional advances for the purchase of additional sheep, brought the indebtedness of the defendant Wilbur to the plaintiff up to the sum of \$35,000. The sheep described in the mortgage of September 13, 1930, covered all the sheep described in the mortgage of March 18, 1930, which had not been disposed of, including the 1,439 head taken by the defendant Smith on July 25, 1930. The sheep covered by the mortgage of September 13, 1930, were located both in Colusa and Sutter counties. The chattel mortgage was recorded in both counties and registered in the office of the secretary of state.

On March 20, 1930, the plaintiff pledged the note of March 18, 1930, together with the chattel mortgage securing its payment, to the Intermediate Credit Bank of Berkeley, to secure advances made by the latter bank to the plaintiff. After the execution of the second note and mortgage on September 13, 1930, the plaintiff pledged a new note and mortgage to the Intermediate Credit Bank of Berkeley. Thereafter, on October 25, 1930, the Intermediate Credit Bank of Berkeley released the mortgage dated March 18, 1930.

On April 23, 1931, the plaintiff discharged its indebtedness to the Intermediate Credit Bank of Berkeley and took a reassignment of the note and mortgage dated September 13, 1930. At the time of the beginning of this action there was still due on this note and mortgage the sum of approximately \$24,500, exclusive of the interest. All of the property referred to in the mortgage has been taken by other persons than the plaintiff, and the plaintiff is without any security whatever for the payment of the note dated September 13, 1930. Judgment was entered for the respondent, and the plaintiff appeals.

The court found that the value of the 1,439 head of sheep taken by the respondent on the 24th day of July, 1930, was the sum of \$7,987. The court made the following findings, the correctness of which is challenged by the appellant, which findings are numbered as follows, to wit:

"5. It is not true that said note and mortgage of September 13th, 1930, was made as a renewal of the first described chattel mortgage attached to said second amended complaint and marked Exhibit 'A'.

"6. It is not true that said mortgage of September 13th, 1930, was never intended as a satisfaction or discharge of said first described chattel mortgage.

"7. It is not true that said mortgage of September 13th, 1930, described the same sheep described in said mortgage, marked Exhibit 'A' and additional sheep, and it did not include the description of the fourteen hundred thirty-nine (1439) head of sheep referred to in said complaint.

"8. It is true that on or about the 25th day of July, 1930, the defendant, Hazel Hoke Smith, took into her possession the said fourteen hundred thirty-nine (1439) head of sheep described in said complaint, but it is not true that said defendant, Hazel Hoke Smith, converted said sheep, or any of them."

While the contention is made that the chattel mortgage dated March 18, 1930, did not

include the 1,439 head of sheep taken by the defendant Smith on the 25th day of July, 1930, no evidence is called to our attention in support thereof. The record shows that on July 25, 1930, when the defendant Smith took the 1,439 head of sheep, the defendant Wilbur had on hand no sheep except those described in the mortgage dated March 18, 1930. This is shown by the uncontradicted testimony of the defendant Wilbur:

"Q. Now, at that time Mrs. Smith took 1439 head of sheep from you on July 25, 1930, did she take any of the sheep described in that mortgage (of March 18, 1930)? A. She did.

"Q. How many of the sheep that she took were described in that mortgage (of March 18, 1930)? A. All the sheep."

And that the sheep were likewise described in the chattel mortgage of September 13, 1930, appears from the uncontradicted testimony of the defendant Wilbur as follows:

"Q. Now, do you recall, Mr. Wilbur, an inspector coming to the Houch ranch to inspect your sheep after Mrs. Smith had come in and segregated 1439 head? A. Yes, sir.

"Q. At the time that inspector was there, were those same sheep on the Houch ranch? A. Yes, sir.

"Q. Did he count them as your sheep? A. Yes, sir.

"Q. Did you tell him anything to the contrary? A. No, sir.

"Q. Then, when the mortgage was made up, which is dated September 13, 1930, were those 1439 head of sheep included in that mortgage? A. Yes, they were."

The testimony as to the different brands borne by the various bands of sheep in nowise controverts the foregoing testimony.

[1] The finding of the court that the sheep covered by the oral agreement were not included in the mortgage dated September 13, 1930, is directly contrary to the uncontradicted testimony. The finding of the court, likewise, that the defendant Hazel Hoke Smith did not convert the sheep to her own use is shown by the uncontradicted testimony that she took and sold said number of sheep covered by the chattel mortgages executed and delivered to the plaintiff by the defendant Wilbur.

The right of the plaintiff to recover in this action depends upon whether the note and mortgage dated September 13, 1930, was a renewal of the note and chattel mortgage dated March 18, 1930, and not a payment of the original indebtedness or a release of the lien

created by the first chattel mortgage. The alleged error of the trial court consists in holding that the second note and mortgage was a payment in satisfaction of the original indebtedness, in addition to finding against the uncontradicted evidence to which we have referred.

To clarify the situation somewhat we may state that the plaintiff is a corporation organized and existing under the laws of California, having its principal place of business in the city of Fresno, being organized for the purpose of loaning money to purchasers of live stock, and obtaining funds for such purpose from the Intermediate Credit Bank of Berkeley, which was authorized by an act of Congress to make loans for the purposes just mentioned.

The testimony of the witness Ramsey shows that the plaintiff, when an application was made for a loan on live stock, would send an inspector to look over the stock, report the same to the company, and then the amount of money required or desired, if approved, would be advanced, and a note and chattel mortgage taken to cover the same. If the plaintiff did not have on hand sufficient funds to make the loan, the note and mortgage would be assigned to the Intermediate Credit Bank of Berkeley; that these mortgages were renewed from year to year, taking new paper and including the balance that might be due on account of previous notes and mortgages, the sum due being always included in the subsequent mortgage; that this procedure had been followed for several years.

As we have stated, the record shows that the note and mortgage dated March 18, 1930, was assigned to the Intermediate Credit Bank of Berkeley, and, likewise, the note and mortgage dated September 13, 1930. The balance due on the note and mortgage dated March 18, 1930, was entered into, and became a part of the note of September 13, 1930, to wit, in the sum of \$7,642.94. The testimony of the witness Ramsey shows that this sum had never been paid; that it was simply incorporated into the September note and mortgage.

It is further shown that at the date of the execution of the note and mortgage of March 18, 1930, the plaintiff had no knowledge of any one claiming any interest in any of the mortgaged sheep.

Our attention has not been called to any testimony, and a careful search of the transcript fails to disclose any testimony indicating that there was an agreement or in-

tention on the part of the plaintiff in this action, in taking the note of September 13, 1930, to consider the same as a payment or discharge of the lien due on the note of March 18, 1930, and the lien created by the chattel mortgage executed on the same date, though the transcript does show that some time after the execution of the note and mortgage dated September 13, 1930, the record of the mortgage dated March 18, 1930, is marked "discharged."

[2] That the oral agreement referred to in the transcript by which it was sought, between the defendants Wilbur and Smith, to substitute the 1,400 head of sheep for those originally covered by the contract of sale, and which the defendant Smith had disposed of, is absolutely void and of no effect, is shown by reference to section 3440 of the Civil Code, which specifies that: "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against * * * encumbrancers in good faith subsequent to the transfer." The uncontradicted testimony shows that there was no change of possession; that the only transfer consisted of an oral agreement, of which the subsequent incumbrancer was not advised.

[3] The contention that this action was not prosecuted by the real party in interest is without merit. This clearly appears from the case of *Graham v. Light*, 4 Cal. App. 400, 88 P. 373. That was a case where an assignment had been made of personal property to secure an indebtedness, but before the action was begun, there had been a reassignment. The court held: "Where there was a reassignment by the pledgee to the pledgor pending suit before trial, it was proper to render a judgment in favor of the pledgor upon the note, without the necessity of an order bringing in the pledgee as a party to the action." In the present case there had been a reassignment of the note and mortgage upon which this action is based, prior to the institution of suit, and the lien created by the first mortgage as well as the amount due upon the first note were carried into and became a part and parcel of the second note and mortgage, as the authorities hereinafter cited establish.

[4.5] The respondent calls our attention to a number of cases holding that the discharge

of a mortgage raises the presumption of satisfaction of indebtedness and the release of the lien. The application of the principles enunciated in the various cases cited cannot be made here, for the simple reason that the action at bar involves the renewal of a note and mortgage carrying into it the indebtedness and lien created by a prior note and mortgage, where the presumption is directly contrary to the contention advanced by the respondent.

In *White v. Stevenson*, 144 Cal. 104, 77 P. 828, while the opinion does state that the entry of satisfaction of an old mortgage is presumptive evidence that it has been satisfied, it is not conclusive. The case, however, involves the execution of a new mortgage. And it is further held that "the acceptance of the new note and mortgage as a renewal of the former note and mortgage, in the absence of evidence of any agreement that the new note and mortgage should be accepted in payment and satisfaction of the old, does not operate as an extinguishment or discharge of the latter."

Again, the contentions of the respondent that the release of the mortgage dated March 18, 1930, in the record, extinguished the lien, is fully answered in the case of *Palmer v. Emanuel*, 77 Cal. App. 766, 247 P. 609, 610. We quote therefrom the following: "In *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, at page 20, 20 P. 28, 30, the court said: 'It has been repeatedly held by this court that the acceptance of a note for a debt does not discharge the debt unless expressly agreed to be payment; that in such case the right of action on the debt is suspended until the maturity of the note given, and suit may be brought on the original debt in case of the nonpayment of the accepted note.' The burden of showing that an express agreement has been made rests on the party relying on it, and the presumption is that the later notes were not taken in absolute payment. *Bridge v. Connecticut Mut. Life Ins. Co.*, 167 Cal. 774, 781, 141 P. 375. A receipt in full does not prove the existence of the agreement. *Comptoir D'Escompte v. Dresbach*, supra. Neither does a formal release. *Tolman v. Smith*, 85 Cal. 280, 290, 24 P. 743. Nor that the note was marked canceled. *Steinhart v. National Bank*, 94 Cal. 362, 367, 29 P. 717, 28 Am. St. Rep. 132. The foregoing rules were applied to a debt secured by mortgage. *Van Sandt v. Alvis*, 109 Cal. 165, 41 P. 1014, 50 Am. St. Rep. 25. In *White v. Stevenson*, 144 Cal. 104, at page 108, 77 P. 828, 830, the court said: 'The acceptance by the plaintiff of the note and mortgage of 1895 as a re-

newal of the note and mortgage of 1890, or in substitution therefor, did not of itself operate as an extinguishment or discharge of the latter. One executory agreement is not extinguished by the execution of another between the same parties; nor is a security for an obligation merged in another security of the same degree which is accepted for the same obligation. It is a well-settled rule that, in the absence of an agreement to that effect, a promissory note is not paid by the execution of another note, but that the time for its payment is thereby merely suspended until the maturity of the new note.' That case likewise holds that it is the duty of the party alleging payment, satisfaction, and discharge, by reason of such entry, to make proof thereof, and that the taking of the new note and mortgage was, by agreement, that the same should operate as a payment of the note, and a discharge of the lien. Nothing of that kind appears in the transcript in this case. There is no testimony of any agreement to the effect, or any intimation of any intention whatever that the note and mortgage dated September 13, 1930, should be considered as a payment and discharge of the indebtedness and lien created by the note and mortgage dated March 18, 1930.

The holding in the Palmer Case is in accordance with the ruling had in the case of *Parker v. Tout*, 207 Cal. 590, 279 P. 431, in which case it was held that without an agreement to such effect, where the indebtedness, secured by a first note and mortgage, was carried into a second note and mortgage, the lien created by the first mortgage would be continued. It appears, also, in the case of *Parker v. Tout*, supra, that the later note and mortgage included sums in addition to the amount specified in the first note and mortgage. The lien was held to exist, limited, however, to securing the amount of the indebtedness still remaining due, as evidenced by the first note and mortgage.

In the case of *United States v. Grover et al.* (D. C.) 227 F. 181, 183, where a similar question was under consideration, the court held: "So long as the same debt, or some part of it, subsists, the presumption ordinarily is that the new mortgage is intended, as a renewal of the old, and a continuance of the same security. *Sloan v. Rice*, 41 Iowa, 465; *Markell v. Eichelberger*, 12 Md. 78; *McDonald v. McDonald*, 16 Vt. 630. Nor does the including in the new mortgage of an additional indebtedness not covered by the first discharge the lien of the old mortgage, so far as the indebtedness secured thereby remains unpaid, unless such be the purpose of

the parties. *London & S. F. Bank v. Bandmann*, 120 Cal. 220, 52 P. 583, 65 Am. St. Rep. 179; *De Cottes v. Jeffers*, 7 Fla. 284. And very clearly the difference in the rate of interest between the two mortgages where, as here, the rate is less in the last mortgage than in the first, cannot be regarded as material to indicate an intention to create a new obligation and abandon the security of the old. *Kern v. Hotaling*, 27 Or. 205, 40 P. 168, 50 Am. St. Rep. 714."

The reduction of the rate of interest, just as appears in the present case, was held not to be material.

In *Howard v. First National Bank of Hutchinson*, 44 Kan. 549, 24 P. 983, 986, 10 L. R. A. 537, where the same questions were being considered as are now before this court, it was held: "The taking of a new note and mortgage on personal property to secure an indebtedness already evidenced by a note and secured by a mortgage on the same property does not, even when the first note and mortgage are canceled, operate to discharge the lien of such first mortgage.' *Packard v. Kingman*, 11 Iowa, 219. 'Nothing but payment in fact of the debt, or the release of the mortgage, will discharge a mortgage.' *Crosby v. Chase*, 17 Me. 369; *Hadlock v. Bulfinch*, 31 Me. 246. In *Gregory v. Thomas*, 20 Wend. [N. Y.] 19, the court says: 'But it is said that the defendant's second mortgage extinguished the first; and consequently, being put to stand exclusively on the last, which was in 1835, the plaintiff's mortgage of the previous September is let in. The argument is against all the books, ancient and modern. Adjudications of several centuries upon such cases, of every variety of form, in England, in this state, and in neighboring states, settle the proposition that a subsequent security for a debt of equal degree with a former, for the same debt, will not, by operation of law, extinguish it.'"

In 33 A. L. R., beginning on page 149, are collected a number of cases supporting the rule that the taking of a second mortgage without any agreement to the contrary is not a payment, but is simply a means of carrying the original indebtedness and lien into the second mortgage. The citation of cases is preceded by the following general statement: "It is a general rule that the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. And where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held

to have subordinated his security to an intervening lien unless the circumstances of the transaction indicate this to have been his intention, or such intention upon his part is shown by extrinsic evidence." This statement of the general rule is supported by a long list of cases. It is further stated in the same annotation, as follows: "As between the parties and the holders of liens existing against the property at the time a senior lien is discharged and another lien taken in renewal, it has been held that the transaction does not amount to a payment, and will not affect the priority of lien; at least, unless the subsequent lien holder has acted to his prejudice in the matter by relying upon the apparent discharge of the senior lien." Nothing of that kind appears in the present action. The 1,439 head of sheep were taken by the respondent several months before either the execution of the second mortgage or the cancellation on the record of the first mortgage.

The same rule is set forth in the text in 11 C. J. 683, to wit: "The validity of a chattel mortgage is not affected by the fact that the mortgage holds independent collateral security, and the taking of a new or additional security to secure the same debt and covering the same property as a prior chattel mortgage does not, of itself, and in the absence of an agreement or understanding to that effect, operate to release or discharge the prior mortgage, or to destroy the priority obtained by virtue of the original mortgage. The same rule has been held to apply where the second mortgage is for an increased amount, or where it secures an additional claim, or covers additional property."

The testimony in the instant case shows that the second mortgage was taken to continue the lien created by the first mortgage, but also to create a lien on additional sheep for which the plaintiff had advanced money to the defendant Wilbur in order to enable him to purchase the same. The record likewise shows that cancellation was not entered

of the first mortgage until some time after the lien on the sheep in question, created by the first mortgage, had been carried into the second mortgage, and also the amount of money remaining due upon the first note, carried into and evidenced by the second note.

[6] The respondent further contends that the location of the sheep covered in the mortgage is insufficient. In this particular, without going into the evidence as to the location, we think the rule set forth in 11 C. J. 457, applicable, which rule is as follows: "As against third persons the description in the mortgage must point out the subject-matter so that such persons may identify the chattels covered, but it is not essential that the description be so specific that the property may be identified by it alone, if such description suggests inquiries or means of identification which, if pursued, will disclose the property covered. This rule is based upon the maxim, that is certain which is capable of being made certain. So a description is sufficient if it may be aided by parol proof and the property covered by the mortgage identified." See, also, *United Bank & Trust Co. v. Powers*, 89 Cal. App. 690, 265 P. 403; 5 Cal. Jur. 54.

The respondent also contends that there should be credited on the balance of \$7,642.94, due on the note dated March 18, 1930, and carried into the September note, the sum of \$4,500, which the court found was paid on account of the September note. We fail to find in the record any testimony showing payment of the sum of \$4,500. The record does show that on September 28, 1930, the sum of \$4,000 was realized from the sale of 500 head of Oregon sheep, and applied on the note. This amount, as contended for by the appellant, should properly be credited against the amount advanced for the purchase of the same sheep, and not as against any balance due on the March note.

It follows that the judgment should be, and it is hereby, reversed.

2 Cal.2d 441

PEOPLE v. VAILE.

Cr. No. 3763.

Supreme Court of California.

Feb. 20, 1935.

1. Criminal law ⇨1202(7)

Entry of second judgment, three years after rendition of first judgment, that accused was habitual criminal, and not subject to parole, *held* not prejudicial, where first judgment stated that accused, being convicted of two felonies with three prior convictions of felony, was ordered to be confined in state prison (Pen. Code, § 644).

2. Criminal law ⇨1202(6)

Where defendant has been found to be habitual criminal, trial court should include as part of judgment formal adjudication that defendant was habitual criminal, but omission of such formal adjudication in final judgment does not impair its effectiveness so long as judgment contains adjudication that defendant has been convicted of several crimes which, when committed by single person, renders him an habitual criminal (Pen. Code, § 644).

3. Criminal law ⇨1208(9)

Indeterminate sentence provisions of statute providing for imprisonment *held* inapplicable, where under indictment, plea, verdict, and commitment, under which accused was convicted of two felonies with three prior convictions of felony and was ordered to be confined in state prison, only term of imprisonment permissible under law was imprisonment for life without parole (Pen. Code §§ 644, 116S).

In Bank.

Appeal from Superior Court, Yolo County; Forrest A. Plant, Judge.

Alton H. Vaile was adjudged an habitual criminal, and he appeals.

Appeal dismissed.

Prior opinions 29 P.(2d) 233; 36 P.(2d) 185.

Alton H. Vaile, in pro per.

U. S. Webb, Atty. Gen., Jess Hession and William F. Cleary, Deputy Attys. Gen., and Neal Chalmers, Dist. Atty., of Woodland, for the People.

PRESTON, Justice.

In this cause both appellant and respondent sought a rehearing, which was granted. Upon further consideration of the cause we

are led to adhere to our former conclusion and readopt the opinion then prepared for the court by Mr. Justice Curtis, as follows:

The appellant was charged by an information filed August 15, 1930, in the superior court of the county of Yolo with the commission of four felonies and also with three prior convictions of a felony. He was found guilty of two of the felonies charged, and plead guilty to the three prior convictions of a felony as alleged in the information. The trial court thereafter, and on October 14, 1930, pronounced judgment against him. Said judgment was entered upon the minutes of the court, and the court, as shown by said entry upon its minutes, after reciting that defendant had been convicted of two of the felonies charged against him in the information, and that he had pleaded guilty to the three prior convictions of a felony, pronounced judgment as follows: "And no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment: That whereas the said Alton H. Vaile has been duly convicted in this court of the crimes of lewd and lascivious conduct, and infamous crime against nature, with three prior convictions of felony, it is therefore ordered, adjudged and decreed that the said Alton H. Vaile be punished by confinement in the State Prison of the State of California, and that the said Alton H. Vaile be taken to the Warden of the State Prison at Folsom." Said minute entry further showed that the court then ordered that the defendant be remanded to the sheriff of the county of Yolo, to be by him delivered into the custody of the warden of the state prison at Folsom, Cal. A copy of this minute entry, certified as provided by law, was by the sheriff of said county delivered to the warden of the state prison at Folsom, at the time of the delivery of the defendant by said sheriff to said warden. On June 9, 1933, which was almost three years after said judgment was pronounced, the trial court made an order directed to the sheriff of said county to take defendant from the state prison at Folsom and bring him before said court for such further proceedings as to the court might seem meet and proper. It was recited in said order that the same was made for the reason that "the court had omitted to find that the defendant was an habitual criminal without right of parole, and it appearing to the court to be a proper order in the premises." In compliance with this order, the sheriff brought said defendant before the trial court, and said court again pronounced judgment against him, which said

judgment was in all respects substantially like the first judgment pronounced against defendant, except that in said second judgment the court expressly adjudged defendant to be an habitual criminal by reason of said three prior convictions and the conviction in this action, and adjudged that said defendant "as such habitual criminal be punished by confinement in the state prison of the state of California, without the right of parole." It is from this judgment that the present appeal has been taken.

[1, 2] Appellant assigns various reasons why the judgment should be reversed. His main contention is that he has been prejudicially affected by the entry of the second judgment by reason of the fact, as claimed by him, that by the second judgment he had been adjudicated to be an habitual criminal and punished as such habitual criminal, while by the first judgment he was sentenced and punished only for the two felonies of which he was convicted in the superior court of the county of Yolo. We think the appellant has misconceived the legal effect of the first judgment pronounced against him by said superior court. In that judgment the court expressly found and adjudicated that the defendant had been convicted of two felonies after three prior convictions of a felony. It then directs that defendant be imprisoned in the state prison of the state and that the sheriff deliver him to the warden of said state prison. The commitment which was delivered to the warden, being a certified copy of the court's judgment, clearly showed that defendant had suffered the three prior convictions of a felony as well as his conviction of the two felonies charged against him in the information herein. Section 644 of the Penal Code as then in force declared that a defendant so convicted should "be punished by imprisonment in the state prison for not less than life and shall not be eligible to parole." There is no basis whatever for the claim of defendant that under the first judgment he was sentenced and punished only for the two felonies with which he was charged in said information, as said judgment expressly adjudicated his three prior convictions of a felony as well as the subsequent conviction of two felonies. There was therefore in legal effect no difference between the two judgments, and the defendant was in no way injured by the entry of the second judgment. It is true that the second judgment contains a formal adjudication that the defendant was an habitual criminal. The procedure leading up to the pronouncement of this second judgment apparently followed the suggestion made by this court in the case of

In re Boatwright, 216 Cal. 677, 683, 15 P.(2d) 755. The validity of a judgment like the first judgment pronounced herein was not before us in that proceeding, and what was said in our opinion relative to such a judgment cannot be held to be a judicial determination of that question. In cases where a defendant has been found to be an habitual criminal, we think, as stated in our opinion in the Boatwright Case, that the trial court should include therein as part of said judgment a formal adjudication that the defendant was an habitual criminal. But the omission of such formal adjudication in a final judgment would not vitiate said judgment nor in any way impair its effectiveness so long as the judgment contained an adjudication that the defendant had been found guilty of the several crimes which, when committed by a single person, rendered him an habitual criminal. The defendant, therefore, was not aggrieved by the pronouncement of said second judgment. If the second judgment is erroneous for any reason, the first judgment is in full force and effect, and in pursuance thereof he is subject to punishment as an habitual criminal. If the second judgment is valid, it neither adds to nor detracts from the force and effect of the first judgment. It would avail defendant nothing to have the second judgment set aside, reversed, or in any way modified.

[3] As stated in the foregoing opinion, under the indictment, plea, verdict, and commitment, the only term of imprisonment permissible under the law was imprisonment for life without parole (section 644, Pen. Code, as it read at the time judgment was pronounced). Under such circumstances, the indeterminate sentence provisions of section 1168 of the Penal Code are inapplicable. The law itself has set a sole, definite, and unchangeable period of imprisonment; therefore, when the court sentenced the defendant, it was of necessity for this period.

As we read the cases of In re Heath, 49 Cal. App. 657, 194 P. 68, and Ex parte Heath, 193 Cal. 192, 223 P. 546 (second application of same defendant), they confirm this conclusion. See, to the same effect, In re Carlton, 53 Cal. App. 225, 200 P. 51.

By this holding no judicial function devolves upon the board of prison terms and paroles. Pronouncing of sentence is distinctly a judicial act. What we have here done is merely to hold that the only construction that can be given the judgment rendered on this conviction is that which imposes a sentence of life imprisonment. The resen-

tence of the court added clarity but did not add efficacy to the former judgment.

The appeal is dismissed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; THOMPSON, J.



3 Cal.App.2d 612

CURTIS v. TITLE GUARANTEE & TRUST CO.

Civ. 1132(4).

Supreme Court of California.

March 14, 1935.

Trusts ⇨250

Where trustee, selling lots dealt with property as its own, and received money from purchaser, without disclosing trustee's relationship, purchaser, rescinding for fraud, could recover judgment against trustee in individual capacity, especially where it continued to retain money.

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by Mayme H. Curtis, etc., against the Title Guarantee & Trust Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 40 P.(2d) 562.

Keogh, Cate & Colver and William P. Mealey, all of Los Angeles, for appellants.

Dana R. Weller and C. F. Culver, both of Los Angeles, for respondent.

PER CURIAM.

On the record the appeal of the Title Guarantee & Trust Company is correctly decided by the District Court of Appeal.

In addition it may be said that the company dealt with the property as its own, received the money paid by the plaintiff, and the trial court properly found on the evidence that it was not true that said company had turned over to the alleged beneficiaries the money so paid. Acting as principal in the transaction and through its own agent, the defendant made no showing that its relation-

ship of trustee, secret and undisclosed so far as the plaintiff was concerned, should relieve it from responsibility as a principal to return the money paid by reason of the fraud of its agent, especially when, so far as the record shows, it continued to retain the money paid by the plaintiff. On the facts, the case is ruled on the theory of Wedge v. Security-First National Bank, 219 Cal. 113, 25 P.(2d) 411, and Speck v. Wylie (Cal. Sup.) 36 P.(2d) 618. To limit the judgment to one against the defendant in its representative capacity only, as was done in Gist v. Security Trust & Savings Bank, 218 Cal. 581, 24 P.(2d) 153, would not be justified on the record presented.

By denying a hearing, we do not necessarily approve the apparent holding of the District Court of Appeal that laches is in every instance an affirmative defense.

The petition for hearing after decision by the District Court of Appeal is denied.



2 Cal.2d 566

HOLTZE v. HOLTZE et al.

Sac. 4876.

Supreme Court of California.

Feb. 28, 1935.

Rehearing Denied March 29, 1935.

1. Husband and wife ⇨141

Husband held not entitled to interest in wife's separate land which she conveyed to her son because husband performed some services and expended some money in improvements thereon prior to conveyance.

2. Trusts ⇨66

Husband could not claim interest in wife's separate land which she conveyed to her son on theory of resulting trust arising because of absence of consideration, where son in accepting conveyance agreed to assume heavy indebtedness on property, and paid off substantial part thereof.

3. Trusts ⇨35(2)

Oral agreement, whereby son was to hold mother's separate realty conveyed to him in trust for mother, her husband, and himself, was not enforceable as express trust (Civ. Code, § 852).

4. Trusts ⇨102(1)

Where wife's separate realty was conveyed to her son on son's alleged oral promise to divide profits of any resale with husband and wife, and realty had not been sold, husband *held* not entitled to interest in land on ground of constructive trust arising from son's violation of oral promise (Civ. Code, § 852).

In Bank.

Appeal from Superior Court, Medocino County; W. D. L. Held, Judge.

Action by J. H. Holtze against Lulu H. Holtze and another, wherein defendants filed cross-complaints. From a decree for plaintiff, defendants appeal.

Reversed in part.

Mannon & Brazier, of Ukiah, for appellants.

Taft & Spurr, of Ukiah, for respondent.

LANGDON, Justice.

Plaintiff J. H. Holtze brought an action to secure a divorce and to determine an alleged interest in real property. Defendant Lulu H. Holtze answered, and cross-complained for a divorce. Defendant E. C. Cox answered and cross-complained to quiet title. The trial court denied a divorce to each spouse, but gave a decree in favor of plaintiff declaring him to be the owner of an undivided one-third interest in certain lands. Defendants appealed.

That portion of the judgment which deals with the property interest is without support in the record. Some five parcels of land are involved. All interests therein belonged either to the defendant wife as her separate property, or to the defendant Cox, her son by a former marriage. Some of the interests came by deed from Mrs. Holtze's former husband; some of them by devise of said former husband to her and to her son; and some were purchased with separate funds, after Mrs. Holtze's marriage to plaintiff. On September 23, 1926, the properties were heavily involved with mortgages and an attachment, aggregating an indebtedness of about \$40,000. On that date a deed of the land was made by Mrs. Holtze to E. C. Cox. Plaintiff alleged that at the time of the conveyance it was orally agreed that Cox was to hold the property in trust for all three parties.

[1-4] The undisputed evidence establishes the separate character of the land conveyed to defendant Cox. Plaintiff admittedly per-

formed some services and expended some money in improvements thereon prior to the making of the conveyance in 1926, but under the established rule in this state, improvements by a husband on the wife's separate property, made with community funds, do not give him any interest in the land itself. See *Provost v. Provost*, 102 Cal. App. 775, 779, 283 P. 842; 3 So. Cal. L. Rev. 226. Cox, in accepting the conveyance, agreed to assume the heavy indebtedness on the property, paid off a substantial part thereof, and hence gave consideration for the transfer. The case is not, therefore, one of a transfer of property to one who gives no consideration, by or on behalf of one who has given consideration or is the beneficial owner. There is no basis for a resulting trust. And, since the entire transaction relied upon was oral, there cannot be an enforceable express trust in the lands. Civ. Code, § 852. The only possible theory upon which plaintiff could proceed would be that the parol promise was repudiated under such circumstances as to justify the imposition of a constructive trust. But the evidence wholly fails to support such a theory. Plaintiff's own testimony is that the understanding was that defendant Cox was to take over the property, all three parties were to devote their efforts to putting it on a paying basis, and that if and when the property was sold for a profit, that profit would be divided between the three. He testified directly and repeatedly that he understood he was to get no money and no interest in the property unless and until it was sold at a profit. The property has not been sold. It is quite evident, therefore, that the alleged oral promise of E. C. Cox to divide the profits of any resale with plaintiff and his wife has not been violated, and the grounds for a constructive trust are entirely lacking.

The judgment appealed from gave plaintiff a legal one-third interest in the lands as owner. This was clearly incorrect. Plaintiff has no interest in the property either as owner or as beneficiary of a trust, and as to that part of his action he is entitled to no relief. Whether, at some future time, in the event of a sale of the lands, he is entitled to share in the profits, is a question not presented by pleading or proof and is not before us.

With respect to the right to a divorce, plaintiff sued on the ground of extreme cruelty. The defendant Mrs. Holtze cross-complained charging willful neglect. No very strong attack is made on the judgment by appellant on this issue, and we are satisfied that the

judgment, in so far as it denies a divorce to plaintiff and to said defendant must stand.

The judgment is reversed in part for the reasons heretofore stated; appellants to recover costs.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; THOMPSON, J.



5 Cal.App.2d 203

VANIER v. POWELL

Civ. 9442.

District Court of Appeal, Second District,
Division 2, California.

March 9, 1935.

Appeal and error ⇨931(1)

Court of Appeal must view evidence in light most favorable to respondent on appeal.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Jack Vanier against Robert W. Powell. Judgment for plaintiff, and defendant appeals.

Affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellant.

G. Vernon Brumbaugh and Thomas J. Dunningan, both of Los Angeles, for respondent.

CRAIL, Justice.

This appeal is from a judgment for damages arising out of personal injuries in an automobile collision. The first contention of the appellant (defendant) and the one which he stresses with most emphasis is stated by him as follows: "Is the unsupported testimony of two persons who contradict each other on the question of an overtaking car 'cutting in' in front of another car going in the same direction and who were approximately five hundred feet away at the time and not in a position to see clearly the relative positions of the cars at the time of passing and who admit their inability to determine the distance between the cars at the time of the alleged 'cutting in', sufficient to sustain a find-

ing of negligence against the driver of the overtaking car where the driver of said car testifies positively and without equivocation that he did not 'cut in' and that he did nothing to interfere with the operation of the overtaken car and that he was driving in a careful manner at all times?" It is obvious from the statement of the question itself that the appellant is engaged in an attempt to persuade this court that the preponderance of the evidence at the trial was in the appellant's favor. But it is our duty on appeal to view the evidence in the light most favorable to the respondent. We find there is substantial evidence to support the findings of the trial court.

The second and last contention of the appellant is that the evidence does not sustain the several findings of the trial court with regard to general and specific damages. We have examined these findings and reviewed the evidence with regard thereto, and find that there is substantial evidence to support them.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



PEOPLE v. MURGUIA. *

Cr. 1414.

District Court of Appeal, Third District,
California.

March 8, 1935.

Hearing Granted by Supreme Court
April 5, 1935.

1. Homicide ⇨340(2)

Defendant, having been convicted of second-degree murder, could not complain of refusal of instruction either to acquit or to convict of first-degree murder.

2. Criminal law ⇨1186(4)

Whether evidence in murder prosecution justified court's instruction regarding flight held immaterial, where evidence sustained conviction (Const. art. 6, § 4½).

3. Statutes ⇨118(1)

Statute providing that in prosecution for committing felony against another's person while armed with prohibited weapon without permit, fact of being so armed constitutes prima facie evidence of intent to commit such felony held unconstitutional because subject-

matter was not mentioned in title, and hence instruction quoting such statute in prosecution for attempt to murder was erroneous (St. 1923, p. 697, § 3; Const. art. 4, § 24).

4. Criminal law Ⓒ1186(4)

In murder prosecution, instruction quoting unconstitutional statute making fact of being armed with prohibited weapon without permit prima facie evidence of intent to commit alleged felony against another's person held harmless, where evidence sustained conviction (St. 1923, p. 697, § 3; Const. art. 4, § 24; art. 6, § 4½).

5. Homicide Ⓒ300(3)

In murder prosecution, instruction that plea of self-defense is unavailing if defendant seeks quarrel intending to force deadly issue, and thus, through his fraud, contrivance, or fault, create real or apparent necessity for killing, held proper under evidence.

6. Homicide Ⓒ117

To justify killing in self-defense, it must appear to slayer as reasonable person that danger was so urgent that killing was absolutely necessary to save his own life or prevent great bodily harm, and that deceased was assailant, or, if not, that slayer bona fide endeavored to decline further trouble.

7. Homicide Ⓒ244(1)

Evidence that argument arose during card game and that deceased, having profanely addressed defendant, asked defendant to go outside, and that after two or three minutes defendant did so, being followed by deceased with knife, and that defendant shot deceased after firing two shots into ground, sustained conviction for second-degree murder as against plea of self-defense.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Francisco Murgula was convicted of murder in the second degree, and he appeals.

Affirmed.

Gregory P. Maushart, of Los Banos, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowling, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was convicted of murder in the second degree in the superior court of Merced county, upon an information charging him with having, on or about the 13th day of October, 1934, willfully, unlawfully, feloniously, and with malice aforethought mur-

dered one Aristideo Martinez. From the judgment following the verdict of the jury finding the defendant guilty of murder in the second degree, and from the order of the court denying his motion for a new trial, the defendant appeals.

The defendant and the deceased were of Mexican extraction, and were living together in a cabin on a certain cotton ranch known as the Hamburg ranch near Los Banos, in Merced county, and were employed as cotton pickers. The defendant and the deceased had been acquainted for a period of about six weeks, and for three weeks preceding the 13th day of October, 1934, had been occupying the same cabin.

The record shows that the defendant and the deceased went to the town of Los Banos on the afternoon of October 13, 1934, and later in the evening returned to the Hamburg ranch. It does not appear that the deceased and the defendant were together in Los Banos or that they returned to the ranch together. At about 7 or 8 o'clock on the evening of October 13, 1934, the defendant, the deceased, and a few other Mexicans were engaged in playing cards at one of the cabins located on the cotton ranch. During the course of the game an argument took place between the deceased and the defendant, during which time the deceased addressed some profane language to the defendant, following which the deceased asked the defendant to go outside. In two or three minutes thereafter the deceased and the defendant went outside. It does not appear that any discussion or argument took place between the defendant and the deceased when they got outside. The testimony is to the effect that the deceased followed the defendant, having a knife in one of his hands; that the defendant told the deceased not to come any closer; the deceased kept following the defendant, whereupon the defendant fired two shots into the ground, and then, the deceased not heeding this warning, the defendant fired a third shot into the body of the deceased, the shot entering just above the left temple. The death of Martinez immediately followed. After the shooting the defendant walked away a distance of 60 or 70 feet, when another Mexican who was at the ranch brought the defendant back to the body of the deceased.

There is some question raised as to whether the deceased did or did not have a knife in one of his hands, but the preponderance of the testimony is to the effect that the deceased was carrying a knife. Only one wit-

ness saw the actual shooting. This testimony is to the effect that the deceased had something in one of his hands which he took to be a knife, but apparently he was not certain. The testimony does show that a knife was lying by the left hand of the deceased immediately after the shooting.

Upon this appeal it is urged that the testimony does not support the verdict, also, that the court erred in giving certain instructions to the jury; and likewise erred in the refusal to give an instruction to the jury that the defendant should be found guilty either of murder in the first degree or should be acquitted.

Reversing the order followed by counsel in their arguments we will consider first the instructions and then the testimony of the deceased as to what it shows, and the verdict that it supports.

[1] The objection that the court erred in refusing to instruct the jury that it should find the defendant guilty of murder in the first degree, or should find him not guilty, is clearly answered in the case of *People v. Hudson*, 92 Cal. App. 593, 268 P. 687, 688. The court there was considering the question of robbery. The jury found a verdict of robbery in the second degree. In passing upon a like question tendered for our consideration, the court there said: "Appellant has no substantial ground of complaint that he was convicted of second degree robbery upon evidence which would have justified the jury in finding him guilty of the more serious offense of first degree robbery. *People v. Muhlner*, 115 Cal. 303, 47 P. 128; *People v. Tugwell*, 32 Cal. App. 520, 529, 163 P. 508." The cases of *People v. DiDonato*, 90 Cal. App. 366, 265 P. 978, and *People v. Watts*, 198 Cal. 776, 247 P. 884, are readily distinguishable from the circumstances presented here. To hold that it is not error for the trial court to refuse to instruct a jury as to a lesser offense or degree of an offense included within the crime charged, where the offense is of such a nature as to warrant a verdict of guilty only of the higher offense, or a verdict of acquittal, is not to hold that it is error on the part of the court to instruct the jury as to the several degrees included within an indictment or information charging the defendant with the crime of murder. The testimony which we will hereinafter set forth, we think amply supports the verdict finding the defendant guilty of murder in the second degree.

[2] Error is alleged on the part of the court in instructing the jury on the question of

flight. The testimony is to the effect that after the defendant had shot the deceased, he walked away some 60 or 70 feet, when another individual spoke to the defendant and the two returned to where the body of the deceased was lying. This person spoke to the defendant and told him to come back and see what he had done. The evidence does not show that the defendant was hurrying away or that he intended flight, but irrespective of whether there was sufficient testimony in the record to justify an instruction on the subject of flight is immaterial, as the verdict returned in this case is the only one justified by the testimony.

[3, 4] The court also instructed the jury as follows:

"You are instructed that section 3 of the act of the legislature of the state of California entitled, 'An Act to control and regulate the possession, sale, and use of pistols, revolvers and other firearms capable of being concealed upon the person, etc.', approved June 13, 1923, Statutes of 1923, page 695, as amended, reads in part as follows: 'In the trial of a person charged with committing or attempting to commit a felony against the person of another, while armed with any of the weapons mentioned in Section One hereof, or while armed with any pistol, revolver or other firearm capable of being concealed upon the person, without having a license or permit to carry such firearm as hereinafter provided, the fact that he was so armed shall be prima facie evidence of his intent to commit such felony.'

"Therefore, if you find from the evidence that the defendant was at the time of the killing of the said Aristeo (Aristideo) Martinez armed with a pistol or revolver and did not have a license to carry such pistol or revolver, then, the fact that he was so armed and did not have such license is prima facie evidence that he intended to kill and murder the said Aristeo (Aristideo) Martinez."

The appellant contends that this instruction violates the provisions of section 19 of article 6 of the Constitution, which specifies that judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law. The argument is also advanced that the instruction as given by the court eliminated entirely the necessity of showing deliberation, premeditation, malice, or intent; that under such an instruction all that it would be necessary for a prosecution to show would be that some offense had been committed, and that the one charged with the offense was carrying a gun without a license.

We agree with the contentions of the appellant that the instruction of the court, to the effect that he was carrying a revolver without a license was prima facie evidence that he intended to kill and murder Aristideo Martinez, constituted error. We do not need to follow the argument of the respondent that the Legislature has power to provide rules of evidence to the effect that certain acts are prima facie evidence of certain other acts, for the simple reason that the paragraph found in section 3 of the Act of the Legislature, approved June 13, 1923, Statutes 1923, pp. 695, 697, and the subject therein referred to, is not mentioned in the title of the act, and is not germane to anything mentioned in the title of the act, as it relates to a separate and distinct offense from that of carrying concealed weapons, and therefore is violative of section 24 of article 4 of the Constitution.

The paragraph quoted by the trial court in this instruction stands out alone and is no part and parcel of any other portion of the act, and dealing with an exclusive subject not mentioned in, and not germane to anything in, the title, renders it repugnant to the section of the Constitution which we have mentioned. The instruction as given by the court we think clearly erroneous, as contended for by the appellant. This, however, does not necessitate a reversal, as under the testimony given by the defendant himself, there has been no miscarriage of justice.

After giving some preliminary testimony as to his acquaintance with the deceased, where they were at work, where they lived, where they had been on the afternoon of October 13, 1934, their meeting at one of the cabins in the evening some time between 7 and 8 o'clock, and engaging in the playing of cards, the defendant testified as follows:

"Q. At that time was Martinez drunk or sober? A. I cannot say, he was playing cards all right.

"Q. Did you have a discussion or argument at that time or any time during the card game with Martinez? A. No.

"Q. You and Martinez sometime that night had a fight, did you not? A. Yes, sir.

"Q. What caused the fight? A. When we were sitting playing cards and I had a pair of fives and he had a pair of eights, and so I bid and I put down about thirty cents and then he cursed me.

"Q. What kind of a game were you playing? A. Poker.

"Q. Stud poker? A. Yes, sir.

"Q. You say he cursed you. What did he call you? A. He called me a son-of-a-bitch.

"Q. And what did you say? A. I told him not to say that, that it was not right for him to say that.

"Q. What did he answer to that? A. He asked me to go out.

"Q. Did you go outside? A. Not right away, no, sir.

"Q. Did you afterwards go outside? A. Yes.

"Q. Tell the court and jury what happened when you went outside with Martinez? A. When I went out I went ahead and he followed me and I seen he had a knife in his hand.

"Q. Tell me what he said there? A. I was ahead of Martinez and I turned around and seen the knife in his hand.

"Q. You were ahead of Martinez? A. Yes.
* * *

"Q. You were both walking out and you saw a knife? A. We were both walking out and I was ahead of Martinez and I turned around and seen a knife.

"Q. How did you turn? (The witness indicates.) A. And Martinez followed me.

"Q. Martinez followed you? A. Yes, sir, and I told Martinez not to get close to me.

"Q. You told him not to get close to you? A. Yes.

"Q. And what did he do? A. He kept coming towards me and then I took my gun out and shot to the ground.

"Q. Did you say anything to him? A. Nothing.

"Q. Then what happened? A. Then he came towards me with the knife and then is when I shot him.

"Q. That is when he was coming towards you with the knife? A. Yes, sir."

[5] The cross-examination of the defendant did not change the testimony given in chief in any particular, as it went mostly to show that the defendant had made a somewhat different statement immediately after the commission of the homicide. The testimony of the defendant, as we have set forth, shows that he and the deceased went outside the cabin, where they had been engaged in playing cards, for the purpose of settling the dispute or controversy existing between them, and brings the case clearly within one of the instructions given by the court to the jury, as follows: "You are instructed that self-defense is not available as a plea to a defendant who

has sought a quarrel with the design to force a deadly issue, and thus, through his fraud, contrivance or fault, to create a real or apparent necessity for killing."

It is evident that the deceased and the defendant did not go outside of the cabin simply for the purpose of settling the dispute between them by any form of argument or further discussion. Nor is there any showing that the defendant employed or sought to employ all reasonable means within his power, consistent with safety, to avoid an encounter with the deceased, or to avert the necessity of an encounter, or the necessity of killing the deceased.

It does not appear from the testimony that the defendant was in fear that he was about to receive great bodily injury, or that he acted under any such influence of fear, or that he acted under any well-founded or other belief that it was necessary for him to kill the deceased in order to avoid bodily injury to himself. It does not appear that there was any overt act on the part of the deceased, or that he had made any demonstration indicating an intent to assault the defendant and use the knife, if it be conceded that the deceased had a knife in his left hand.

[6] Here, again, an instruction given by the court correctly stated the law, to wit: "The court further instructs the jury that to justify the killing of another in self-defense, it must appear to the slayer, as a reasonable person, that the danger, if any, was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary. And it must appear that the person killed was the assailant, or, if not the assailant, that the slayer had really and in good faith endeavored to decline further trouble before the fatal shot was fired." And further: "Whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates, with a view of having his adversary act upon it, and he so acts and is killed, the plea of self-defense under such circumstances is unavailing."

[7] The testimony of the defendant as to what occurred in the cabin where the deceased and the defendant were playing cards is practically the same as that given by other occupants of the cabin, all of the testimony of the occupants of the cabin being to the effect that the deceased and the defendant were playing cards; that a controversy arose be-

tween them; that the deceased invited the defendant to go outside after hostile words had been used; and that within a minute or two after the deceased and the defendant went outside the shooting took place. Whatever peril appeared to the defendant after stepping outside of the cabin is thus shown to be partly of his own procurement. He and the deceased had both voluntarily gone outside, and, as further appears, the defendant accepted the invitation of the deceased to go outside, and the conclusion necessarily follows, and the jury could not escape such conclusion, that they went outside for the purpose of settling the dispute other than by means of a simple discussion of the merits of the controversy.

The testimony of the defendant fully supporting the verdict of the jury finding him guilty of murder in the second degree under the provisions of section 4½ of article 6 of the Constitution, it follows that the errors of the court did not result in a miscarriage of justice.

The judgment and order are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



4 Cal.App.2d 608

MANGANO et al. v. GUARANTY BUILDING
& LOAN ASS'N et al.

Civ. 1570.

District Court of Appeal, Fourth District,
California.

Feb. 16, 1935.

Rehearing Denied March 12, 1935.

Hearing Denied by Supreme Court
April 15, 1935.

1. Mortgages ⇐379

Complaint which alleged that plaintiffs owed defendant \$22,000 secured by a trust deed, that after plaintiffs had defaulted defendant orally agreed to accept \$12,500 in full settlement, that plaintiffs were about to tender that amount to defendant when defendant foreclosed deed and sold property for an amount greater than original indebtedness, held not to state a cause of action to recover excess or for accounting as to attorney's fees charged when trust deed was foreclosed (Civ. Code, § 1698).

2. Mortgages ⇨303

Trustee's oral promise, made without consideration, to accept less than the amount stated in trust deed in full settlement of sum due does not preclude trustee from foreclosing trust deed, since written contract cannot be changed by unexecuted oral agreement (Civ. Code, § 1698).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Suit by Joseph Mangano and another against the Guaranty Building & Loan Association and another. From a judgment dismissing the complaint, plaintiffs appeal, and defendant Guaranty Building & Loan Association makes a motion to dismiss the appeal.

Appeal dismissed, and judgment affirmed.

Harry H. Parsons and Raymond E. Hodge, both of San Bernardino, for appellants.

George T. Warren, of Hollywood, for respondent.

BARNARD, Presiding Justice.

This is a motion to dismiss the appeal or affirm the judgment on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The only question presented is whether an amended complaint stated a cause of action. A demurrer thereto was sustained, and the plaintiffs in open court declined to further amend. A judgment of dismissal was entered, and this appeal followed. The plaintiffs dismissed the action as against the defendant city, and the defendant building and loan association will be herein referred to as the defendant.

[1] The allegations of the complaint are so indefinite and uncertain that it is difficult to understand what was intended thereby. So far as we are able to understand the pleading, it attempts to set out that the plaintiffs owned a building in the city of Redlands; that they had borrowed \$22,000 from the defendant, secured by a trust deed on this property; that on May 1, 1933, while they were in default in certain payments of both principal and interest, the defendant orally agreed to accept \$12,500 worth of its certificates, which then had a present value of 51 cents on the dollar, in full settlement of the indebtedness referred to; that on June 1, 1933, the defendant changed its mind and recorded a notice of sale in accordance with the terms of the trust deed; that after due

proceedings the property was sold on October 20, 1933, at which time it was bought in by the defendant; that some time in October, the date not being given, the plaintiffs secured a loan for \$12,500 and were about to tender this amount to the defendant when the defendant changed its mind and repudiated the agreement; and that in March, 1934, the defendant sold the property to the city of Redlands for \$28,500. After thus attempting to allege a breach of an agreement to accept certificates of the value of \$12,500 in full settlement of a debt of \$22,000, the complaint proceeds to allege that the plaintiffs are entitled to any excess in the amount received by the defendant from the city over the amount of the original indebtedness, and the prayer is for \$6,500, as such excess, and for an accounting as to certain attorney's fees and expenses which it is claimed were improperly charged.

[2] The allegations of the complaint with reference to the making of this new agreement are exceedingly vague, and for the most part are pure conclusions. It is not alleged that the plaintiffs agreed to deliver the certificates or anything else, nor is anything said about when this was to be done. If any such agreement was made, there is nothing to show or to indicate that the defendant violated the same by filing notice of intention to sell on June 1, 1933, or that in any respect it exceeded its rights by later proceeding to sell the property. While it is alleged that because of the depression the plaintiffs were unable to secure a new loan until some time in October, 1933, and that they then secured one for \$12,500, it is not even alleged that they secured this before the sale was completed. It is not alleged that they ever had or procured any certificates, or that they ever tendered them or anything else to the defendant. No consideration for the purported agreement was alleged, or now appears, and the most that can be said of such facts as are alleged is that they tend to show that an offer was made which was never accepted. Even if an agreement was made, there would appear to be an attempt to change a written contract by an unexecuted oral agreement without any consideration, which may not be done. Civ. Code, § 1698.

There are certain allegations tending to show that the defendant knew of this possible market for the land before the foreclosure proceedings were completed, but none to indicate that the plaintiffs were not equally well advised, and there is a complete fail-

ure to allege anything that could adversely affect the validity of the sale of this property to the defendant.

The complaint having failed to state a cause of action and the plaintiffs having declined to amend, the judgment was properly entered. The motion is granted, and the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



5 Cal.App.2d 279

MOIOLA v. PAGGI et al.
Civ. 9454.

District Court of Appeal, Second District,
Division 2, California.

March 15, 1935.

1. Appeal and error ⇨931(1)

On appeal from judgment for plaintiff in action for alienation of affections of plaintiff's wife, evidence must be viewed in light most favorable to plaintiff.

2. Appeal and error ⇨1012(1)

Appellate court will not weigh evidence nor substitute its judgment thereon for that of trial court, but will uphold verdict, notwithstanding appellate court would have decided otherwise if it had been fact finder.

3. Appeal and error ⇨989

When appellate court is satisfied that substantial evidence exists to support verdict, court's examination as to such matter ceases.

4. Evidence ⇨357

In action for alienation of affections of plaintiff's wife, letters written by wife to plaintiff five years prior to marriage held not inadmissible as too remote, where state of mind or state of feeling of allegedly alienated wife toward plaintiff was one of material facts in issue, on defendants' contention that marriage was result of sudden infatuation on part of wife.

5. Evidence ⇨145

Whether evidence is too remote to be admissible is determined by trial court in its wide discretion.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Richard Moiola against Dante Paggi and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Paul E. Younkin, of Los Angeles, for appellants.

Lorrin Andrews, of Los Angeles, for respondent.

CRAIL, Justice.

[1-3] This is an appeal from a judgment in favor of the plaintiff for damages against the parents of plaintiff's wife for alienating her affections. It is the first contention of the appellants that there is an entire absence of any proof either that the defendants were a contributing cause of the separation or that the defendants acted in any manner maliciously toward the plaintiff. The appellants set out in a supplemental opening brief containing 509 pages all the evidence pertaining to these questions, and this was a challenge to the respondent to point out some substantial evidence to sustain the verdict as to these questions of fact. The respondent accepted the challenge and set out in detail the evidence upon which he relies. It is our duty on appeal to view the evidence in the light most favorable to the respondent. Having done so, we are satisfied that there is some substantial evidence to sustain the findings. Appellants in their closing brief attack this showing only as to five details which seem to be of small consequence. They further say: "Inasmuch as appellants do not feel that any direct reference to this quoted testimony will be of aid to your Honorable Court in reviewing the *entire record* to determine whether or not there is sufficient evidence therein to support the judgment, we will not attempt to point out the portions of the record that are *in direct conflict* with the testimony quoted under this heading by respondent." Under the circumstances we feel that we should say again what has so often been said that it is the province of an appellate court to decide questions of law; that while the question of the sufficiency of the evidence to support a verdict may be presented to the appellate court for review, this may be done solely as a matter of law, and the court's duty stops when it has determined that there is some substantial evidence to support the verdict; the court will not weigh the evidence nor substitute its judgment thereon for that of the trial court, but will uphold the verdict even though it would have

decided otherwise if it had been the fact finder. See 2 Cal. Jur. 912. If and when the appellate court is satisfied that substantial evidence exists to support the verdict its examination as to this matter ceases at once. Estate of Moore, 162 Cal. 324, 122 P. 844.

[4, 5] Appellants' final contention is that it was error to have admitted into evidence the letters written by the wife to plaintiff five years prior to the marriage. The state of mind or the state of feeling of the allegedly alienated wife toward her husband was one of the material facts in issue, for it was the contention of the defendants at the trial that the marriage was the result of a sudden infatuation on the part of the wife. Appellants contend that the letters were too remote in time. Ordinarily remoteness affects the weight of evidence rather than its admissibility. Jameson v. Tully, 178 Cal. 380, 173 P. 577. The determination of the question whether evidence is or is not too remote is for the determination of the trial court and it is clothed with wide discretion in this regard. In re Estate of Warner, 167 Cal. 686, 140 P. 583. The court's discretion was not abused.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



5 Cal.App.2d 339

KNOBLAUGH et al. v. McKINNEY et al.
Civ. 9563.

District Court of Appeal, Second District,
Division 2, California.

March 19, 1935.

Rehearing Denied May 16, 1935.

1. Landlord and tenant ☞213(1)

Where bank at which rent was payable refused rent tendered because of bank holiday then in effect by reason of order of superior legal authority, bank's refusal was not voluntary, and did not constitute waiver of payment of rent tendered.

2. Landlord and tenant ☞192(1)

Where earthquake rendered apartments uninhabitable and all of sublessees left, but lessees did not elect to terminate lease and remained in possession while lessors proceeded with repairs, obligation of lessees to continue paying rent as provided by lease held

not diminished or otherwise affected by impairment of property by earthquake (Civ. Code, §§ 1932, 1933).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by Erma D. Knoblaugh and others against George W. McKinney and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Hugh G. Maddox, of Long Beach, for appellants.

C. Roy Smith, of Long Beach, for respondents.

SCOTT, Justice pro tem.

Plaintiffs, lessors of an apartment house, recovered judgment against defendants, lessees, in this suit for unlawful detainer, for possession of the premises in question and for rent. From such judgment defendants appeal.

[1] In July, 1932, plaintiffs leased to defendants a three-story brick apartment building in the city of Long Beach, at a monthly rental of \$320, due on the 1st day and in default on the 10th day of each month, payable at a designated bank in that city. On March 10, 1933, defendants tendered the rent to said bank, but it was refused, owing to a bank holiday then in effect which precluded the bank from accepting it. That night an earthquake occurred which rendered the apartments uninhabitable, and all of the tenants left. Lessees concentrated their possessions in a limited area within the building, and continued occupying a portion of it, and lessors entered, with knowledge and consent of the lessees, to restore the building to an habitable condition. In this work of restoration lessors acted on the advice and under orders of the municipal building authorities. The March rent was never again tendered and was not paid, and on April 7, no payment having been made for the month of April, a three-day notice to pay rent or quit was served by lessors upon the lessees. On April 12, no rent having been paid for the two months in question, this action was brought, and plaintiffs were awarded judgment for \$445 rent and possession of the premises.

It is apparent that the temporary disability of the bank was due to a restraint by a superior legal authority and was of a few days' duration, and that payment should have been

made when as a matter of common knowledge lessees knew that said bank could have accepted it. The refusal by the bank was not voluntary and did not constitute a waiver of payment of the March rent.

[2] The lessees make no claim that they elected to terminate the lease under the provisions of section 1932 of the Civil Code. *Meek v. Cunha*, 8 Cal. App. 98, 96 P. 107. They chose to remain in possession while the lessors proceeded with repairs. This is not a case in which the lease was terminated by the destruction of the premises, as contemplated by Civil Code, § 1933, nor by any terms of the lease itself. Under circumstances such as here presented, the obligation devolving upon lessees to continue paying rent as provided by the lease was not diminished or otherwise affected by the impairment of the property by earthquake. *Harvey v. Weisbaum*, 159 Cal. 265, 113 P. 656, 33 L. R. A. (N. S.) 540, Ann. Cas. 1912B, 1115; *C. M. Staub Shoe Co. v. Byrne*, 169 Cal. 122, 145 P. 1032; *Pedro v. Potter*, 197 Cal. 751, 242 P. 926, 42 A. L. R. 1165.

Contrary to the further suggestion of appellants that they had been evicted by the lessors, the trial court found on sufficient evidence "that plaintiffs (lessors) exercised no control or dominion over the said premises other than was made necessary by the exigencies of the occasion, and defendants were not, nor were either of them, at any time evicted from said premises by any act or series of acts attributable to plaintiffs." Since lessees had failed to surrender the premises or pay the rent, lessors were entitled to judgment.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 304

LANCASTER v. INDUSTRIAL ACCIDENT
COMMISSION et al.
Civ. 10147.

District Court of Appeal, Second District,
Division 2, California.
March 18, 1935.

1. Master and servant ⇨417(7)

Determination of Industrial Accident
Commission on conflicting evidence is final.

2. Master and servant ⇨405(4)

Evidence held to justify denial of workman's compensation under showing that employee had chronic heart trouble which had reached stage where disability might ensue at any time from any exertion and that disabling condition arose while he was doing work of employment which, though heavy, would not of necessity be characterized as extraordinary or unusual.

Proceeding under the Workmen's Compensation Act by Lee L. Lancaster, opposed by Charles W. Dabney and/or Lucy R. Dabney, employers, and the Travelers' Insurance Company, insurer. Compensation was denied by the Industrial Accident Commission, and claimant brings certiorari.

Affirmed.

J. Vincent Wood, of Santa Barbara, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Industrial Accident Commission.

SCOTT, Justice pro tem.

Certiorari to review order of respondent commission denying compensation to petitioner. The latter, a thickset, vigorous prizefighter, was employed as gardener for respondents Dabney. While planting a heavy tree, he experienced pain, and later reported to a physician, who determined that he suffered from coronary occlusion, a condition of the heart. The commission concluded that the evidence did not establish that petitioner sustained injury arising out of and occurring in the course of said employment. There was competent medical evidence that "the work that the applicant was doing was not an exciting factor in precipitating or aggravating the coronary occlusion," and one physician declared: "I believe that this man had been slowly developing the pathology of coronary sclerosis for a number of years. The resulting coronary occlusion might as readily have occurred at any other time."

[1, 2] Where there is substantial conflict in the evidence in such a case as this, the determination of the commission is final. *Murray v. Industrial Accident Commission*, 216 Cal. 340, 14 P.(2d) 301. We cannot substitute our own opinion, whether or not it is in accord with the commission's finding. The evidence would warrant a conclusion that petitioner had chronic heart trouble which had reached a stage where disability might ensue

at any time from any exertion, and the disabling condition arose while he was doing work of his employment which, although it was heavy and a strain, would not of necessity be characterized as extraordinary or unusual. Under such circumstances, compensation is properly denied. *McNamara v. Industrial Accident Commission*, 130 Cal. App. 284, 20 P.(2d) 53.

Order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 225

RAMISH v. ASTOR et al.

Civ. 8860.

District Court of Appeal, Second District,
Division 1, California.

March 11, 1935.

1. Principal and surety ☞59

Corporation being surety for hire held less entitled to insist that it stands as favorite under law than those who become sureties through friendly considerations, as regards claim that creditor's consenting to stay of execution on judgment against principal released surety.

2. Principal and surety ☞110

Surety on bond for repayment of loan held not released, where principal, without surety's knowledge, entered into stipulation with creditor providing for entry of judgment against principal and 60 days' stay of execution.

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by Adolph Ramish against Sam Astor and the Eureka Casualty Company, with E. Forrest Mitchell, State Insurance Commissioner, as substituted defendant. From a judgment for the defendant company, plaintiff appeals.

Reversed, with direction.

H. H. Harris and David E. Field, both of Los Angeles, for appellant.

Edgar H. Craddock, Albert J. Morrissey, and Edward J. Cotter, all of Los Angeles, for respondents.

ROTH, Justice pro tem.

Appellant Ramish loaned \$6,150 to Astor, one of the defendants, at which time Astor executed a promissory note for that amount and caused to be executed a bond by Eureka Casualty Company, a corporation, the other defendant and respondent on this appeal. The bond was conditioned upon the repayment of the money by Astor, and in effect provided that, if Astor did not pay, respondent would. Astor did not pay, whereupon appellant filed his complaint alleging two causes of action; the first on the note against Astor, and the second on the bond against respondent.

Thereafter the cause was called for trial, all parties being present in person and by counsel, at which time the trial court was informed by the attorneys for appellant and Astor that appellant and Astor had made a stipulation, which would be subsequently reduced to writing, the effect of which was that the answer and counterclaim theretofore filed by Astor would be withdrawn, a general denial substituted therefor, and that a judgment might be entered against Astor for \$6,150 principal, interest accruing on the same, attorney's fees in the sum of \$200, and that a stay of execution might be granted for sixty days. After the noon recess, the court having reconvened, the stipulation in substance as above was in open court filed in writing. The surety company then asked and obtained leave to file a supplemental answer setting forth as a defense to the action the stipulation referred to, alleging that the stipulation was made without the consent and knowledge, and against the wishes and will of the surety company, and claiming by reason thereof an alteration in the contract of the principal debtor and the complete release as surety under its bond.

The trial court found that the stipulation in question operated as an alteration of the contract with the principal debtor, and was therefore a release of respondent surety, and in accordance therewith gave judgment for respondent. From that judgment this appeal is taken.

[1, 2] There were other circumstances in the case, but a recital thereof is unnecessary, as enough has been detailed to make clear the facts upon which the decisive question is predicated. Respondent, as surety for hire, is one of those who are "less entitled to insist that they stand as favorites under the law" than those who become such through friend-

ly considerations (*Hunstock v. Royal Securities Corp.*, 51 Cal. App. 769, 197 P. 963; and it has been held in this state that even a personal surety was not released by circumstances such as herein detailed (*Preston v. Hood*, 64 Cal. 405, 1 P. 487). The exact question on similar facts is decided adversely to respondent in the case of *Rio Grande Oil Co. v. Seaboard Surety Corp. of America*, 139 Cal. App. 164, 33 P.(2d) 887, recently decided by this court, in which ample reasons are given for the ruling.

The judgment is reversed, and the trial court is directed to enter judgment in favor of appellant and against respondent.

We concur: CONREY, P. J.; YORK, J.



5 Cal.App.2d 227

BIRDSELL v. DARDI et al.

Civ. 8919.

District Court of Appeal, Second District,
Division 1, California.

March 13, 1935.

Hearing Denied by Supreme Court
May 8, 1935.

Master and servant ☞40(3)

Evidence held to sustain findings that hotel manager rendered services in accordance with employment agreement, that he was wrongfully discharged, that he remained ready, able, and willing to perform services, and that he was thereby damaged.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by M. L. Birdsell against Umberto Dardi and another. From a judgment for plaintiff, and from an order denying a motion for new trial, defendants appeal.

Judgment affirmed, and appeal from order denying new trial dismissed.

H. A. I. Wolch, of Los Angeles, and David D. French, of Santa Barbara, for appellants.

Butcher & Haines, of Santa Barbara, for respondent.

ROTH, Justice pro tem.

Appellants owned and operated a hotel near Santa Barbara and on December 1, 1931, they

engaged the respondent by written contract for a period of one year as manager. The only provision of the contract involved in this lawsuit is: " * * * Said manager shall give his attention and best endeavors to said hotel business, and to the utmost of his skill and power exert himself for the interest, profit, benefit and advantage of said business as manager thereof." On February 2, 1932, appellants by letter advised respondent: "You are hereby discharged as manager * * * for reason as previously explained to you. Your contract is broken for cause." Respondent thereafter sued on the contract, alleging, among other things, that he had been wrongfully discharged, proved his damages, and obtained judgment. The appeal is from that judgment, and from an order denying motion for new trial.

The reporter's transcript comprises more than 500 pages of evidence, the bulk of which is devoted to testimony offered by appellants in an effort to prove two infractions of duty amounting to a breach of the contract of employment, and specifically a breach of that portion of the contract above quoted. The first was to the effect that on or about December 18, 1931, at the dinner hour respondent was intoxicated and made a spectacle of himself in the dining room of the hotel, and that later that evening he brought two strange women into the hotel. The second incident is a showing that contrary to law (the Wright Act [St. 1921, p. 79] being then in effect), respondent brought liquor into the hotel.

The record undoubtedly shows that the respondent had been drinking on December 18, and that girls were brought into the hotel on that date, although the testimony is conflicting on the status of intoxication. The record also shows that respondent had purchased some liquor which was kept in the hotel safe.

The difficulty with appellants' position, however, is that the record shows much more. There is a plethora of evidence showing that on the December 18 in question, appellant Lombardi was entertaining a convivial friend from Los Angeles and called in his manager, the respondent herein, to assist him in his capacity of host. All three had drinks and then adjourned to the dining room for dinner, after which all three went upstairs and respondent then procured the ladies in question, according to the respondent's testimony, at the request of appellant Lombardi. It is also established that the liquor in the safe was purchased jointly by appellant Lombardi and respondent, and that appellant Dardi knew

It was there and made no protest. The record reveals much in addition, but we deem it unnecessary to further analyze or set forth the testimony. Suffice it to say that the evidence amply supports the findings of the trial court that respondent rendered services in accordance with his agreement of employment, that he was wrongfully discharged, that he remained ready, able, and willing to perform services in accordance with the agreement after his discharge, and that he was damaged in the sum found.

The judgment is affirmed; the appeal from the order denying motion for new trial is dismissed.

We concur: CONREY, P. J.; YORK, J.



5 Cal.App.2d 219

BRYDONJACK v. RIECK.

Civ. 8976.

District Court of Appeal, Second District,
Division 1, California.

March 11, 1935.

Rehearing Denied April 8, 1935.

1. Attorney and client ☞166(1)

Mere fact that incompetent person, of whom trial court found attorney had taken advantage in procuring contract for excessive compensation, testified that attorney had not previously acted for her *held* not to prevent finding on evidence to contrary that relation of attorney and client existed at time contract was procured.

2. Attorney and client ☞133

Formal contract is not necessary to create relation of attorney and client.

3. Attorney and client ☞166(1)

In action by attorney's assignee on contract for services, evidence showed that relation of attorney and client existed at time contract was procured, so as to render contract presumptively invalid.

4. Attorney and client ☞166(1)

In action by attorney's assignee on contract of employment procured by attorney at time relation of attorney and client existed, mere testimony by attorney that he had performed all legal services requested until cancellation of contract by client *held* insufficient to sustain burden of showing that contract was fair to client.

5. Attorney and client ☞134(1)

Cancellation by client of contract of employment *held* justified, where there was complete failure of consideration, and attorney failed to perform any of its terms.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by A. C. Brydonjack against Emilie E. Rieck. From a judgment for defendant, plaintiff appeals.

Affirmed.

Thomas P. Cruce, of Los Angeles, for appellant.

Don Marlin, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Appellant's assignor is an attorney at law. Respondent met the attorney socially on January 1, 1929, from which date their acquaintance flowered into friendship. The attorney called upon respondent, escorted her to cafés and clubs, and accompanied her upon rides and visits to friends, all expenses involved being borne by respondent. During the period of this cordial relationship, respondent, undoubtedly impressed with the wholesome interest in her and in her business displayed by the attorney, confided in a general way her affairs and troubles to him. The attorney managed to impress respondent, not only with his sympathetic attitude, but also with his ability and the selective value thereof to such extent that on March 1, 1929, respondent signed a letter prepared by the attorney and addressed to him, in which it was recited that the attorney is retained and appointed as respondent's chief counsel for a period of one year from date at a retainer of \$3,500, plus \$150 monthly salary. The letter further recites: " * * * In your position as chief counsel you are to bring and prosecute any law suits that may be started after this date, also defend any new litigation and supervise litigation now pending; also, to have a general supervisory control of my affairs." When respondent had signed, the attorney under the words "satisfactory" and "accepted" signed also. It appears, however, that prior to March 1st, respondent paid to the attorney \$300 for some services the attorney was supposed to render in connection with property referred to as Corona property or Dana Point property. What the nature of these services was, however, cannot be ascertained from the record. According to the respondent, the attorney rendered no legal

services to her either before or after March 1st, and after that date refused to keep appointments with her and did absolutely nothing for her. It should also be mentioned that at the time the letter was signed and prior thereto, respondent was represented by two other attorneys, who were handling her affairs in an apparently competent manner. On July 6, 1929, respondent signed another letter which was delivered to the attorney in which she says, among other things: " * * * Your authority to act as my attorney, or in any manner for me or in my behalf is hereby revoked and terminated. * * * That certain instrument * * * of March 1, 1929 * * * is hereby cancelled. * * * " Further, "I am taking this action for the reason that the existing situation is unsatisfactory and it seems to me unfair. The amount of money already paid you is, it seems to me, more than sufficient to compensate you for your services rendered to date, and this I am advised is all that you are entitled to, in view of the fact that the contract which you had me sign was not made until after the relationship of attorney and client had already existed between us for some time, and there were circumstances attending the procuring of this contract which make it ineffective."

Upon such notice of termination of contract, the record discloses no immediate action on his part; it appears that he waited until the end of the year. The year having expired and respondent remaining adamant in her attitude as expressed in the second letter, the attorney filed suit through appellant on the contract set forth in the first letter for a balance of \$3,000; \$2,300 having been paid prior to the letter of cancellation.

The evidence, amply supports the findings, among others, made by the trial court that:

" * * * At the time of the making of said contract, defendant had no independent legal advice on said contract * * * and * * * was not familiar with the reasonable value of the legal services which she required. * * * "

"That it is true that the said (attorney) was at the time of the making of said contract familiar with the condition of defendant's affairs and in possession of the requisite information to properly estimate the reasonable value of the legal services which this defendant required, but did not so inform this defendant. * * * "

"That it is not true that defendant terminated and canceled said agreement without cause and on the contrary, that said contract

was greatly in excess of the reasonable value of the legal services which defendant actually required at the time of the making of said contract or thereafter until the time of the termination and cancellation of said contract."

The only attempt made by appellant to prove the rendition of any legal services to respondent was in the cross-examination of respondent at which time respondent was interrogated as to various matters with which the attorney was supposed to have had some connection. What appellant's assignor did in connection with these matters referred to is vague. Respondent did not know and the only direct evidence of anything done after March 1st was a statement made by respondent that the attorney did go out to see the Corona property and that she had a two-hour conference with him in his office. The attorney testified as to his name, the number of years he had practiced; that he performed all legal services requested up to July 6, 1929, and that he assigned his claim in writing to appellant, identifying his signature to the assignment. He was not cross-examined and did not take the stand in rebuttal. The only definite facts in the record, therefore, are that he took a trip to Corona and had a two-hour conference with respondent in his office.

The trial court gave judgment to the respondent, and from that judgment plaintiff appeals.

The trial court found in effect that the attorney took advantage of respondent in making the contract and that the same was therefore invalid, and that respondent was justified in terminating it as she did, even though the contract was not invalid as of the date of its inception.

[1, 2] Respondent in answer to a direct question stated that appellant's assignor did not act as her attorney prior to March 1st, yet the evidence shows that the relation of attorney and client did exist prior to the date the letter of March 1st was signed by respondent and accepted by appellant's assignor. In this respect the record shows, as already pointed out, that the attorney was paid \$300 prior to March 1st and that in discussing the business and affairs of respondent, the attorney promised to obtain certain moneys due her, from what source does not appear, also to represent her in her father's estate, to get money from her former husband in a matter then in litigation, and to straighten out some situation with reference to the Corona property. The record discloses, as the trial court in effect found, that respondent

ent was incapable of attending to her affairs. All her testimony is of the most incoherent kind and her testimony constitutes practically all of the record. Under such circumstances, the mere fact that the respondent answered in the negative a question in which she was asked whether appellant's assignor acted as her attorney prior to March 1st does not at all settle the matter. The question itself calls for a conclusion, but, even if it did not, it would not be binding upon the trial court. No formal contract is necessary to create the relationship of attorney and client. It is the fact of relationship which is important, and not whether the contract, formal or otherwise, preceded such relationship. Jones on Evidence (2d Ed.) vol. 5, § 2166.

[3] In view of the facts as recited, we have no difficulty in holding that the relationship of attorney and client existed between the attorney and respondent prior to the execution of the formal contract dated March 1st, and that such contract is therefore presumptively invalid. The rule with reference to contracts of this character is well summarized in *Thornley v. Jones*, 96 Cal. App. 219, 227, 274 P. 93, 96: "A contract between an attorney and client for the former's compensation, entered into during the existence of the relation, is not void, although presumptively invalid, the burden of showing fairness resting on the attorney." * * * 'All dealings between an attorney and his client for the benefit of the former are not only closely scrutinized, but are presumptively invalid on the ground of constructive fraud and such presumption can be overcome only by the clearest and most satisfactory evidence. Not only must the attorney offer clear and satisfactory evidence that the transaction between himself and his client was fair and equitable and no advantage was taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction and was so placed as to be able to act understandingly and to deal with the attorney at arm's length.' *Estate of Witt*, 198 Cal. 407, 419, 245 P. 197, 202; *Magee v. Brenneman*, 188 Cal. 562, 567, 206 P. 37."

[4] The attorney in the instant case has not sustained the burden of "showing fairness." In fact, he has shown nothing but that the contract was executed. It is the fact of execution alone of the contract in question upon which appellant predicates his cause, his contention in this regard being that the rela-

tionship of attorney and client did not exist at the time of the execution and that the rule quoted from *Thornley v. Jones*, supra, does not apply.

Appellant contends that the parties are dealing with each other at arm's length, although his contention in this respect is the only thing in the record that would lead one to such a conclusion; and that, therefore, the correct rule to apply is: "An attorney may make an enforceable contract with one about to become his client for the payment of compensation for services to be rendered, and such a contract is not subject to the particular scrutiny of the court." 6 C. J. 735; 3 Cal. Jur. 626; *Cooley v. Miller & Lux*, 156 Cal. 510, 105 P. 981.

In the *Miller & Lux Case*, supra, at page 524 of 156 Cal., 105 P. 981, 987, the same principle is thus stated: "Nor is it applicable to a contract by which the relation is originally created and the compensation of the attorney fixed. The confidential relation does not exist until such contract is made, and in agreeing upon its terms the parties deal at arm's length. *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. Rep. 401."

[5] Conceding for the purpose of argument that the relationship did not exist at the time the contract of employment was made, and that the second rule announced, and not the first, applies to the situation here, it makes no difference in the result. Because there is no presumption of invalidity if the second rule applies does not mean that the contract cannot be avoided at the election of either party to it if such party can show legal cause, such as fraud, noncompliance with its terms, or failure or total lack of consideration. The evidence in this case warrants a finding that there was a complete failure of consideration, and an utter failure on the part of appellant's assignor to perform any of the terms of his contract. Under such circumstances, respondent undoubtedly has the right to terminate, as she did.

Although such certainty is not required in civil cases, we do not hesitate to say that we are convinced to a moral certainty that there has been no miscarriage of justice in this case.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

PEOPLE v. WEINBERG et al.

Cr. 2675.

District Court of Appeal, Second District,
Division 2, California.

March 8, 1935.

Hearing Denied by Supreme Court
April 5, 1935.

1. Arson ☞37(1)

Evidence, in trial for arson and burning insured property, *held* sufficient to show criminal origin of fire.

2. Arson ☞37(1)

Evidence, in trial for arson and burning insured property, *held* sufficient to support jury's conclusion that defendant committed crimes charged.

3. Criminal law ☞1170(4)

Exclusion of testimony, in trial for arson and burning insured property, that one defendant attached special value to picture exposed to fire, and testimony as to what defendants said to each other after deciding to take out fire policy in larger sum than they originally intended, *held* not ground for reversal of conviction, in view of comprehensive questioning on all material issues.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Nathan Weinberg and Ida Weinberg were convicted of arson and burning insured property, and they appeal.

Affirmed.

Entenza & Gramer, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendants, husband and wife, were convicted in count 1 of arson and in count 2 of burning insured property, and from such judgments each appeals.

[1] In January, 1934, defendants occupied a rented dwelling at the beach in Venice, in which they had installed their own furniture and possessions, which had been insured for \$2,500 against fire. On the evening of the fire defendants and their two children locked the house and went to the amusement zone. An hour or so later a neighbor noticed smoke and flames coming out of defendants' chimney and made an entrance. There was fire in the fireplace and in an overstuffed chair fifteen to twenty feet away, and much smoke. The fire department arrived shortly there-

after. A battalion chief smelled something like kerosene on the rug in the front room. A runner rug was saturated with something which he thought was kerosene. Wood was littered in front of and in contact with the wood burning in the fireplace, having a similar odor. A puddle of the liquid substance was on the floor in the bedroom under a crib. An open door led into a closet where there were clothes, smelling of the same substance. Some wall paper had been burned and had curled up, and still had sparks of fire on it. A window shade and curtain had been burned off and a radio had a little fire in it. Two-thirds of the surface of the rug in the front room was scorched and a portion leading across into the bedroom was burned through to the floor. In the bedroom were crumpled papers on the floor and in the doorway leading into the closet. The captain of the arson squad observed these conditions, and when defendants had returned home shortly after 11 o'clock he questioned Mrs. Weinberg about the liquid. She called it cleaning fluid and stated she had used it on the rugs and her husband's coat in the closet, and that she might have spilled some on the floor in the bedroom and on the clothing, rags, and papers on the closet floor. The can in which she claimed she kept the fluid contained about a teaspoonful of a liquid smelling like kerosene, and had dust all around the top. The evidence was ample to show the criminal origin of the fire.

[2] After the fire defendants went through the house with the captain of the fire department, and Mr. Weinberg said he guessed \$700 to \$750 would cover the loss. Proof of loss of \$273 was submitted. After his arrest he agreed to accept \$50 in full settlement. The neighbor who had first discovered the fire and had entered the house testified that after the preliminary hearing in this case Mr. Weinberg called at his house and said "that it would help him (Weinberg) if I said the screen was over the fireplace."

At the time of his arrest Weinberg told a member of the arson squad that if they took him to jail it would only be a matter of two or three weeks until his family would have to live off the county, because he had no work and no money. At the trial he testified to owning real estate and securities worth about \$20,000, and that he was drawing \$100 a month disability insurance.

The jury's conclusion that appellants had committed the crimes charged is supported by the record.

[3] Appellants complain of the exclusion by the trial court of testimony to the effect that Weinberg attached "special" value to his parents' picture, which was exposed to the fire, although no offer was made to show its insurable value; and also, after they had testified that they had intended to take out only a \$1,000 policy of fire insurance instead of one for \$2,500, the court ruled out testimony as to what appellants said to each other when they changed their minds. In view of a comprehensive questioning on all of the material issues, it does not seem that the questions, even if answered, would have given the jury a more complete understanding of the case.

Certain instructions are likewise assailed which appear to have merely stated legal principles applicable to the case which are so well settled as to require no discussion. The trial court is accused of prejudicial misconduct which appears to have escaped notice of counsel during the trial, because no such objection was interposed at the time. It seems from the record that the court was merely trying to guide both counsel in their argument so as to avoid injustice to either defendants or the people.

Judgments affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 172

LOCKIE v. PENCE.

Civ. 1359.

District Court of Appeal, Fourth District,
California.

March 7, 1935.

Hearing Denied by Supreme Court
May 6, 1935.

1. Automobiles ☞173(7)

Truck owner *held* not negligent because he parked truck two feet to right of center of highway at night where truck which was loaded with four tons of oranges suddenly broke down in manner making it impossible for owner to move truck and owner left man in truck while owner went to telephone mechanic who arrived within five minutes (St. 1931, p. 2128, § 136).

2. Automobiles ☞244(14)

In action for injuries sustained when automobile in which plaintiff was riding collided with parked truck on highway at night,

truck owner *held* not negligent on ground that tail-light on truck was not burning where uncontradicted evidence showed that tail-light was burning at time owner went for help and that it was still burning some time later when mechanic first arrived, and automobile driver testified that if tail-light was burning, he did not see it (St. 1931, p. 2128, § 136).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Portia Lockie against C. W. Pence. From a judgment for defendant notwithstanding verdict for plaintiff, plaintiff appeals.

Affirmed.

James M. Thuesen, of Fowler, for appellant.

Ray W. Hays, of Fresno, for respondent.

BARNARD, Presiding Justice.

Early in the morning of January 29, 1933, the defendant, with an employee, was proceeding north on the Golden State highway in a truck loaded with four tons of oranges. Shortly before 2 o'clock and when they were about 200 yards north of the northerly limits of the city of Selma, the rear axle on the truck broke, the rear end dropped to the pavement, and the truck suddenly stopped with its left wheels from 2 to 4 feet east or to the right of the white line in the center of the highway. The highway at that point consisted of a pavement 20 feet in width, with shoulders 24 feet wide on either side. The defendant left the truck in charge of his employee while he went to a telephone and called a mechanic. It was raining at the time, and, after observing that the tail-light on the truck was burning, the employee got into the cab of the truck. A few minutes later, a car in which the plaintiff was riding and which was driven by her husband approached from the south and crashed into the rear end of the stalled truck with resulting injuries to her. In this action which followed a jury returned a verdict in favor of the plaintiff, after which the court granted the defendant's motion for a judgment notwithstanding the verdict. From the judgment then entered, this appeal is taken.

[1] The appellant contends that the respondent was guilty of negligence in that he illegally parked the truck on the highway and in that the tail-light thereon was not burning. The evidence shows without con-

fict that the truck suddenly broke down in a manner making it impossible for the respondent to move the same, and this fact brings the case squarely within the exception provided in section 136 of the California Vehicle Act (St. 1923, p. 561, as amended by St. 1931, p. 2128). The respondent left a man in the truck while he went to phone for aid and a mechanic arrived within five minutes. The first specification of negligence is entirely unsupported by the evidence.

[2] With reference to whether the tail-light on the truck was burning, the only evidence pointed out by the appellant is that her husband testified that he did not see any light on the rear of the truck before the collision. He testified that it was raining; that his windshield wiper was working; that he was traveling between 30 and 35 miles an hour; that he saw no light on the truck; that he was somewhat blinded by the lights of an approaching automobile which he said was from 300 to 400 yards north of the truck at the time of the collision; and that he did not see the stalled truck until he was within 10 or 15 or possibly 20 feet from it. On examining the transcript, we find that he also testified that after the collision there was no tail-light on the truck, although on cross-examination he qualified this by stating that he stood on his side of his car, and that if a tail-light was burning on the truck he did not see it. On the other hand, two witnesses testified that the tail-light was burning at the time the respondent left to go in search of help. The mechanic testified that he responded to the telephone call; that when he came to the scene of the accident the tail-light was burning; that he then went away to get a new axle; that when he returned the other car was jammed into the rear of the truck; that the force of this impact had bent the tail-light on the truck around and under, but that it was still burning; and that it continued to burn until he put it out in making certain repairs. A traffic officer testified that the tail-light on the truck was still burning after the collision. Aside from its unsatisfactory nature, the evidence offered by the appellant to the effect that the tail-light was not burning, taken in the light most favorable to the appellant, relates only to a time after the accident occurred. The evidence shows, without conflict, that the tail-light was burning at the time the respondent went for help and that it was still burning some time later when the mechanic first arrived. There is no evidence in the record to establish, by infer-

ence or otherwise, any negligence on the part of the respondent.

Most of appellant's arguments are directed to the claim that contributory negligence on the part of her husband does not appear as a matter of law, and that this question was one of fact for the jury. While we are of the opinion that the evidence, in its entirety, discloses contributory negligence on the part of the appellant's husband, it is unnecessary to further quote or analyze the same since, in any event, there was no showing of negligence on the part of the respondent.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



5 Cal.App.2d 44
MACKAY v. CLARK RIG BLDG. CO. et al.
Civ. 1519.

District Court of Appeal, Fourth District,
California.

March 1, 1935.

Rehearing Denied March 28, 1935.

Hearing Denied by Supreme Court
April 29, 1935.

1. Descent and distribution ⇨89

Action by widow and guardian of minor child to compel accounting for money and property of decedent's established business alleged to have been wrongfully appropriated *held* not demurrable on ground that cause of action belonged to estate, where it was alleged that all property of estate which had been located and all property which might thereafter be found had been ordered to be distributed to surviving widow and child.

2. Executors and administrators ⇨315(5)

Effect of final decree in administration proceeding distributing entire property of estate to named persons who are described as heirs at law of decedent is to vest in such persons absolute right and title to all estate property.

3. Pleading ⇨216(2)

Demurrer raises no question of fact and assumes correctness and truth of facts alleged in pleading to which it is interposed, and, on hearing, court is bound by facts as alleged in pleading attacked, and is not entitled to consider facts presented by affidavit.

4. Pleading ⚭216(2)

On demurrer to complaint by widow and guardian of minor child seeking accounting with respect to deceased's business equipment and machinery alleged to have been appropriated by defendants, court's consideration of affidavit alleging that equipment and machinery had been sold and sale confirmed during administration and price had been paid to administratrix *held* error.

5. Contracts ⚭311

Rule that contracts for performance of purely personal acts are discharged by individual's death or disability does not apply, where services are of such character that they may be as well performed by others.

6. Contracts ⚭311

Generally, building contract does not fall within class of agreements which are deemed to have been made because of personal skill of individuals who are to perform them.

7. Contracts ⚭311

Uncompleted contracts for building oil derricks *held* not contracts for performance of purely personal services which were discharged by builder's death, so as to preclude cause of action against defendants alleged to have appropriated contracts.

8. Good will ⚭7

Business of constructing oil derricks *held* not as matter of law without good will value (Civ. Code, § 992).

9. Good will ⚭7

Complaint *held* to allege that business of constructing oil derricks had good will surviving owner's death, justifying action against defendants alleged to have appropriated business (Civ. Code, § 992).

10. Infants ⚭75

Cause of action for accounting against defendants alleged to have appropriated deceased's business by two heirs, one of whom was a minor and other was minor's general guardian, should have been brought by minor through his guardian jointly with other heir.

11. Appeal and error ⚭854(3)

Generally, order sustaining demurrer must be affirmed, if it appears that there was any ground on which order could properly have been made.

12. Pleading ⚭229

That original complaint had been once amended would not justify refusal of permission further to amend.

13. Appeal and error ⚭236(2)

Judgment of dismissal after order sustaining demurrers to amended complaint

without leave to amend *held* reviewable, though no application for leave to file second amended complaint was presented prior to entry of judgment, where judgment was signed on same day as order sustaining demurrers without notice to plaintiffs and motion to vacate judgment on ground that plaintiffs were deprived of opportunity to ask leave to amend was denied.

14. Appeal and error ⚭854(3)

Order sustaining demurrers to amended complaint in accounting action by widow and guardian of minor child could not be sustained on ground that action should have been commenced by minor through guardian, where defect was remedied by second amended complaint, which should have been permitted to be filed, and dismissal would mean loss of apparently meritorious cause of action.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Marjorie H. Mackay, as guardian of the person and estate of Samuel Clark, Jr., and individually, against the Clark Rig Building Company and others. From a judgment of dismissal, plaintiff appeals.

Reversed, with directions.

Goodman, Bachrack & Brownstone, of Los Angeles (Herman A. Bachrack, of Los Angeles, of counsel), for appellant.

George Acret, of Los Angeles, for respondents.

JENNINGS, Justice.

This is an appeal by the plaintiffs from a judgment dismissing the action as to all defendants named in the complaint. The judgment of dismissal was rendered in conformity with a prior order of the court sustaining demurrers both general and special to the complaint without leave to amend. The appeal is also taken from an order denying a motion of plaintiffs to vacate the judgment which motion was made pursuant to the provisions of section 473 of the Code of Civil Procedure and from an order denying an application of plaintiffs for permission to file a second amended complaint and from an order denying a motion for a new trial.

It is apparent from the record and from the briefs of counsel that the judgment dismissing the action is the chief object of attack on this appeal. As above noted, this judgment was entered upon the sustaining of demurrers to the complaint without leave to amend. The primary matter which is here

presented for consideration is therefore to discover whether the complaint is vulnerable to the attack directed against it by the demurrers. Consideration of this question necessitates an analysis of the complaint. In this connection, it must be observed that the judgment of dismissal, after stating that all demurrers, both general and special, had been sustained, recites that, since it appeared to the court "that said plaintiffs, or either of them, have no cause of action against and could not state any cause of action against said defendants or any of them," it is ordered and adjudged that the action be dismissed as to all defendants. The complaint should therefore be considered first with reference to the objection that it wholly fails to state a cause of action against the defendants or against any defendant therein named.

The pleading, which is entitled "Amended Complaint for Accounting," alleges that on October 4, 1929, the plaintiff, Marjorie H. Mackay, was by order of the superior court duly appointed general guardian of the person and estate of Samuel Clark, Jr., a minor; that she thereafter qualified and entered upon the discharge of her duties as such guardian; that she is the mother of the minor, and until September 20, 1927, she was the wife of Samuel Clark, father of said minor; that the minor's father died, intestate, on the above-mentioned date; that subsequent to the elder Clark's death his estate, consisting of both real and personal property, was administered in the superior court of Los Angeles county; that all claims against the estate and all expenses of administration were paid, and on November 27, 1929, all of the property of the estate was ordered distributed in equal shares to the decedent's heirs at law, who were the plaintiff, Marjorie H. Mackay, and the minor, Samuel Clark, Jr.; that at the time of his death, and for eight years prior thereto, the senior Clark was engaged in the business of rig building under the name of "Samuel Clark Rig Builder" as sole owner of such business, and that the business and all assets thereof were his separate property; that plaintiffs are informed and believe, and upon such ground allege, that the business was successful and profitable, "and that said Samuel Clark enjoyed a good will among his customers and patrons who consisted of many of the major oil companies operating in the state of California as well as independent producers of oil"; that at the time of the elder Clark's death his rig building business was being successfully operated as a going concern, and that it consisted of various machinery and equipment used in connection there-

with, and in addition there were then in existence a large number of valuable contracts for the construction of oil derricks which had been made by the deceased with his customers, the exact number of which contracts and the amount of money to become due thereunder is unknown to plaintiffs, who are informed and believe that said contracts involved a large and substantial amount of money; that said contracts were secured by the deceased as a result of his experience, standing, and ability in his business, and that the persons who had made such contracts with the deceased had done so either as a result of previous business transactions with him or as a result of his standing and experience, all of which were well known in the oil industry; that at the time of the elder Clark's death, and for several years prior thereto, the defendant John MacLeod was the trusted and confidential employee of Clark, and acted as the manager of the business in which Clark was engaged, and that MacLeod had complete and intimate knowledge of the customers and of the details and operation of said business; that MacLeod had no interest in the business, but was merely a salaried employee; that plaintiffs are informed and believe, and on such information and belief allege, that at the time of Clark's death, and for some time prior thereto, the defendant W. A. Trout was associated in the business in a capacity whose exact nature is not known to plaintiffs, but that they are informed and believe, and therefore allege, that this defendant was familiar with the customers and with the details and operations of said business, and received therefrom large sums of money, the exact amount of which is unknown to plaintiffs; that said defendants MacLeod and Trout were the only persons other than Samuel Clark who were fully familiar with the business; that immediately subsequent to Samuel Clark's death, and on October 5, 1927, the defendants MacLeod, Trout, and Catherine Clark organized a corporation under the laws of California under the name of Clark Rig Building Company, in which company MacLeod subscribed for and received 70 shares, being 70 per cent. of the authorized capital stock which was issued; that plaintiffs are informed and believe, and on such ground allege, that, although 70 per cent. of the capital stock of the corporation stood in MacLeod's name on the books of the corporation, 50 per cent. thereof, being 35 shares, belonged to Trout and was issued to MacLeod as a convenience to Trout; that no consideration was paid either by MacLeod or

Trout for said stock to the corporation; that 15 per cent. of the capital stock of the corporation was subscribed for, and issued to, the defendant Catherine Clark, who was the senior Clark's mother, and that she gave no consideration to the corporation for the issuance of said stock to her; that the defendant Clark Rig Building Company, under the management and control of MacLeod, who was at all times, and now is, its president, and of Trout, took over and assumed ownership of the physical assets, property, and business of Samuel Clark, completed all orders held by Clark at the time of his death which were then uncompleted, and appropriated to itself and its stockholders the good name and good will of Samuel Clark and his business, without payment therefor; that the formation of the said corporation by MacLeod, Trout, and Catherine Clark was accomplished by them with the purpose of appropriating to the corporation and its stockholders the business, assets, and property and the good name and good will of Samuel Clark without payment therefor; that through the instrumentality of the corporation the above-named defendants did appropriate the assets, property, the going business and good will of Samuel Clark without any payment therefor; that the formation and organization of the said corporation was conceived by the defendants MacLeod, Trout, and Catherine Clark for the purpose and with the intent of defrauding the minor child of Samuel Clark out of his share of the business assets, property, and good will of his father's business; that MacLeod and Trout took advantage of their exclusive familiarity with the patrons of the business and the details and operation of Samuel Clark's business; that the business of the corporation was in fact established and maintained on the good will created by Samuel Clark and on the fact that his business was a going business at the time of his death, and that the use of Clark's name by the defendant corporation was never authorized by the minor child of Clark; that the defendant corporation, Clark Rig Building Company, continued in business for one year and four months subsequent to its incorporation, and during this period did a gross business of approximately \$2,000,000; that, in addition to very substantial salaries paid by said corporation to its officers without proper authority of its board of directors, dividends amounting to approximately \$2,500 per share were paid on the outstanding issued capital stock of the corporation during the aforementioned period; that the earnings of the corporation from which such salaries and dividends were

paid were made out of, and were a direct proximate result of, the unlawful appropriation by the defendants of the going business conducted by Samuel Clark at the time of his death; that during the latter part of the year 1928 the defendants MacLeod and Trout formed the Macco Construction Company under the laws of the state of Nevada, and that this last-named corporation purchased the physical assets, business, property, and good will of the Clark Rig Building Company by issuing to the stockholders of the latter corporation all of the capital stock of the Macco Construction Company; that plaintiffs are informed and believe and on such ground allege, that the incorporation of the Macco Construction Company under the laws of the state of Nevada was designedly done for the purpose of evading the provisions of the Corporate Securities Act of California (St. 1917, p. 673, as amended) and as part of the scheme and plan to defraud Samuel Clark's minor child of his rightful share of the assets, property, and good will of his father's business; that the defendant Macco Construction Company is the alter ego and business conduit of the defendant Clark Rig Building Company, and at all times mentioned in the complaint both of said corporations had and have the same stockholders, directors, and officers; that defendants have refused and neglected to pay to or to account to the minor child for the business, assets, property, and good will of his father's business appropriated by them as aforesaid, and in so doing have wrongfully and with intent to defraud deprived the minor of his rightful inheritance from his father; that said business conducted by the aforesaid corporations is rightfully the property of the minor and all profits derived from said business rightfully belong to said minor; that the exact amount of such profits is not known to plaintiffs, but that defendants have drawn large sums of money by way of salaries and dividends, which on information and belief are alleged to have exceeded the sum of \$500,000; that the only manner by which it can be determined what amount the minor is entitled to receive is through the medium of an accounting by said defendants to the plaintiffs who have no plain, speedy, or adequate remedy at law; that the defendants are using, and will continue to use, the property of the estate wrongfully appropriated by them for their personal gain, and will convert and dispose of the proceeds of the business unless auxiliary equitable relief pendente lite is granted by the court, wherefore a receiver should be appointed by the court in order to

maintain the status quo during the pendency of the action. The complaint concludes with a prayer for an accounting by defendants to plaintiff as guardian of the minor child, and that, when the amount received by said defendants is ascertained by such accounting, judgment for such amount shall be entered against the defendants in favor of plaintiff as guardian of the said minor.

[1] It is the contention of appellants that the amended complaint as above outlined is not obnoxious to attack on the ground that it fails to state facts constituting a cause of action, but that its allegations sufficiently exhibit a cause of action by a minor heir through his general guardian to compel an accounting for money and personal property, including the good will of an established business wrongfully appropriated.

Respondents, on the other hand, maintain the allegations of the pleading show that the foundation of the action is the claimed misappropriation of the good will of a business which by reason of the nature of said business could not survive the death of the owner and the misappropriation of profits claimed to have been derived from the completion of certain contracts for personal service which were terminated with the death of the individual who had agreed to furnish his personal skill in their performance and which, having been thus terminated, could be taken over by any one who possessed the skill required for their completion. It is urged that these particular property rights of an intangible character did not continue in existence after Clark's death. It is contended that the good will of the business which was wholly dependent on the skill and reputation of Samuel Clark did not survive his death. It is also contended that the contracts, being contracts which called for the personal service of an individual who was peculiarly fitted to perform the work described in them, could not continue after the death of this individual. It is further urged that the complaint shows on its face that, if there was any cause of action, it belonged, not to the minor, but to the estate of Samuel Clark, deceased.

Taking up first the last-mentioned contention of respondents, it may be observed that the judgment of dismissal indicates that the trial court evidently entertained the opinion that the amended complaint is fatally defective in the respect mentioned, since the judgment contains a specific proviso that the dismissal of the action shall be "without prejudice to such rights, if any, that the

plaintiffs may have in the probate proceedings of the estate of Samuel Clark, deceased."

It is our opinion that this contention is not sound and that the judgment may not be affirmed on this ground. It may be conceded that the amended complaint is not so definite and certain in its allegations respecting the termination of the Samuel Clark estate as it might be. In the concluding paragraph of the complaint, the pleader alleges "that the defendants are using and will continue to use the property of the estate wrongfully appropriated by them * * * unless auxiliary equitable relief pendente lite is granted by the court." The description of the property as "property of the estate" raises some uncertainty as to whether the estate of Samuel Clark, deceased, had been finally closed. It is, however, alleged in paragraph V of the amended complaint that the estate of Samuel Clark, deceased, was administered in the superior court of Los Angeles county; that the estate consisted of real and personal property; that all claims against the estate and all expenses of administration were paid; "and on the 27th day of November, 1929, all of the real and personal property belonging to the said decedent and described in the inventory on file in said estate, together with all real and personal property described in the final report and account of the administratrix of said estate, together with all the real and personal property of the decedent of every kind and character thereafter found or discovered was decreed and ordered by this court distributed in equal shares to the heirs at law of the said decedent entitled to receive the same, to-wit: Samuel Clark, Jr., the minor child of the decedent, and Marjorie H. Clark, now known as Marjorie Mackay, the wife of said decedent, and plaintiffs therefore allege that the said Marjorie Mackay and the said Samuel Clark, Jr., are the owners of and are entitled to the immediate possession of all personal and real property of every kind and character belonging to the said decedent and his said estate. * * *" Here again it is not definitely alleged that the property of the estate was in fact distributed, hence there is some basis for the argument that the pleading is uncertain, in that it cannot be discovered therefrom whether or not the estate had been closed prior to the institution of the present action. It is our conclusion, however, that the claimed uncertainty is more fancied than real. It must be observed that it is alleged that on a specific date all property of the estate which had then been located and all property which might thereafter be found was ordered to be

distributed in equal shares to the surviving widow and minor child of the deceased.

[2] The effect of a final decree in a proceeding for the administration of an estate distributing the entire property of an estate to named persons who are described as the heirs at law of the decedent is to vest in such persons the absolute right and title to all the estate property. *Estate of Garraud*, 36 Cal. 277; *Stoner v. Security Trust Co.*, 47 Cal. App. 216, 221, 190 P. 500. The comprehensiveness of the decree of distribution as alleged in the amended complaint was sufficient to entitle appellants to institute the action for an accounting, even though the property as to which the accounting is sought was not scheduled as property of the estate in the proceeding for administration.

[3, 4] In this connection, it is contended by appellants that, in ruling on the demurrers, the trial court erroneously took into consideration the contents of a certain affidavit. Respondents, on the other hand, urge that the affidavit was not considered by the court in its ruling on the demurrers, but that it was considered in connection with the application of appellants for permission to file a second amended complaint, and that the contents of the affidavit show that it was proper so to be considered.

The record indicates that the contention of appellants with respect to the affidavit is correct. The affidavit is entitled "Affidavit of F. H. Brown Supporting Defendants' Demurrers to Amended Complaint." It was verified and filed in court on October 13, 1932, which was the date on which the demurrers were argued before the trial court. The order sustaining the demurrers was made on October 14, 1932. So far as appears, there was not then pending before the court an application for permission to file a second amended complaint. A notice of motion to vacate the judgment of dismissal under section 473 of the Code of Civil Procedure was given on October 21, 1932. This motion came on for hearing on November 4, 1932, and the court then continued it to November 9, 1932, for the purpose of permitting appellants to prepare and file in support of the motion a proposed second amended complaint. The second amended complaint was filed on November 7, 1932. The motion was denied on November 14, 1932. Finally, the very judgment of dismissal contains a reference to the affidavit in the following pertinent language: "And the court having considered the affidavit of F. H. Brown, on file herein."

The function of a demurrer is too well established to require the citation of any authorities for its description. It is axiomatic that a demurrer raises no question of fact and that it assumes the correctness and truth of the facts alleged in the pleading to which the demurrer is interposed. On the hearing of a demurrer, therefore, the court is bound by the facts as alleged in the pleading attacked by the demurrer and is not entitled to consider facts presented to it through the medium of an affidavit.

A cursory reading of the affidavit shows that it raised an issue of fact since the amended complaint demanded an accounting with respect to the equipment and machinery used by the decedent in the operation of his business, whereas the affidavit alleged that such equipment and machinery had been sold to the Clark Rig Building Company and the sale thereof confirmed during the administration of the estate of Samuel Clark and prior to the termination of administration, and that the Clark Rig Building Company had received the said personal property and had paid to the administratrix of the Clark estate the agreed purchase price therefor. An additional issue of fact is raised by the affidavit in its concluding paragraph wherein it is denied that the Macco Construction Company is the alter ego of the Clark Rig Building Company or of respondents MacLeod, Trout, or Catherine Clark, and the allegation is made that the Macco Construction Company has more than 150 separate stockholders.

The contention of respondents that the amended complaint shows on its face that the cause of action therein alleged is for an accounting with respect to certain intangible personal property which, under the facts alleged in the pleading, did not exist, may next be considered. As above noted the property which forms the foundation for this contention consists of uncompleted contracts for oil derricks made by the decedent with a number of his customers and the good will of the business in which the decedent was engaged at the time of his death. As to the former, it is declared that they were contracts which called for the personal services of the decedent; that they were terminated at the time of his death; that any one who could satisfy the other parties to these contracts of his ability to complete the work contemplated by the contracts was at liberty to take them over; and that consequently no right of property inured to the decedent's estate or to his heirs at law from the contracts. As to the

latter, it is said that the allegations of the amended complaint show that the business in which decedent was engaged was a one-man business, dependent entirely on the skill and reputation of the decedent, and that the character of the business was such that the intangible property right which is denominated good will could not survive after the owner's death.

It is apparent that the basic foundation of these contentions rests in the premise that the business conducted by the decedent was entirely dependent on his skill and experience as a rig builder and his personal integrity and reputation for fair dealing. In the final analysis, the correctness of this premise rests upon the factual allegations of the pleading. If from the facts which there appear it must be declared as a matter of law that the business of the decedent was so entirely and utterly dependent on his skill and integrity that these elements in fact constituted the business in which he was engaged, the trial court's conclusion that the pleading did not exhibit a cause of action for an accounting with respect to these property rights and that no cause of action can be stated with respect to them must be sustained.

The only allegations of the amended complaint which are descriptive of the business conducted by decedent and which relate to the uncompleted contracts state that at the time of his death the decedent "was engaged in the business of rig building under the name of 'Samuel Clark Rig Builder,' as the sole owner thereof"; that said business was a successful and profitable business, and the decedent enjoyed a good will among his customers and patrons; that, at the time of his death, the rig building business was being successfully operated and was a going concern; that it consisted of certain equipment and machinery, and in addition there were a large number of valuable contracts by which decedent had agreed to construct oil derricks for various customers; that these contracts involved a substantial total consideration to be paid by the other parties thereto which amount is unknown to appellants; that these contracts were secured by the deceased as a result of his experience, standing, and ability in his business; and that the persons who had entered into the contracts with the deceased had done so as a result either of previous business transactions with him or as a result of his standing and experience, which were well known in the oil industry.

With respect to these allegations, it may be observed that they are most general so far as the description of the business is concerned. No attempt is made to set out the details of the business, which evidently consisted of the construction of derricks used in the oil industry. Obviously, the skill of the owner was not the sole element of the business, for there was utilized in the construction of the derricks certain undescribed machinery and equipment of an unstated value. With respect to uncompleted orders for derricks, it is alleged that the persons who had entered into contracts for the construction of derricks by the decedent had done so either because of prior satisfactory transactions with him or because he was known to be an experienced derrick builder who enjoyed a reputation for good workmanship in the oil industry. This is obviously a most general allegation and one that might conceivably be made with respect to any person who had, prior to his death, carried on any kind of business with more than moderate success. The patrons of any mercantile establishment continue to patronize it because of prior satisfactory dealings and because the proprietor has a reputation for fair dealing and for dispensing a good quality of merchandise. Those who employ a carpenter usually do so either because they have satisfactorily employed him theretofore or because he has a reputation for good workmanship and fair dealing. Skill and experience are manifestly important attributes in any industry, but it does not necessarily follow that they alone constitute the industry. We think, therefore, that this allegation does not so certainly show that the contracts contemplated solely the employment of the peculiar skill of Samuel Clark as a rig builder as to amount to an admission that the contracts were for purely personal services.

Furthermore, with reference to the uncompleted orders for the construction of derricks, it must be observed that the amended complaint also alleges that after the death of Samuel Clark the respondents MacLeod and Trout, who, during Clark's lifetime, were associated in the business with him and who were the only persons other than Clark who were fully familiar with the details of the business and with its patrons, organized the respondent corporation, the Clark Rig Building Company, which corporation, under the management and control of MacLeod and Trout, took over and completed all orders for the building of derricks which Clark had on hand at the time of his death. This al-

legation tends to negative the possible inference that might arise from the aforementioned general allegation that the contracts contemplated solely the employment of Clark's peculiar skill and ability as a rig builder and were therefore purely contracts for personal service which did not survive Clark's death.

[5-7] It is the general rule that contracts for the performance of purely personal acts such as the agreement of an author to write a particular book, an artist to paint a certain painting, a sculptor to produce a designated statue, are discharged by the death or disability of the individual whose peculiar talent was to be employed in the performance of such acts. The rule has been extended to the personal services of lawyers and physicians. It is, however, settled that the rule does not apply where the services are of such a character that they may be as well performed by others as by the individual with whom the contract was made. Generally speaking, a building contract does not fall within that class of agreements which are deemed to have been made because of the personal skill of the individuals who are to perform them. *Estate of Burke*, 198 Cal. 163, 244 P. 340, 44 A. L. R. 1341. Taking the allegations of the amended complaint in their entirety, we find ourselves unable to agree with the contention of respondents that the contracts which were unfinished at the time of Clark's death were of such character that it must be declared that they were contracts for the performance of purely personal services which were discharged and terminated by his death.

[8] Section 992 of the Civil Code defines the good will of a business as the expectation of continued public patronage. The following section declares good will to be property "transferable like any other." Respondents concede that during the lifetime of the deceased the business which he conducted may have had a good will capable of transfer as property, but contend that, upon the death of the sole owner, the business, due to its peculiar nature, died with him.

As above noted, the basis for this contention is identical with that which is urged in support of the proposition that the executory contracts for the construction of oil derricks which were uncompleted at the time of decedent's death were terminated thereby and that no property interest in such contracts survived thereafter because the agreements contemplated the personal services of an individual who was peculiarly skilled in

the construction of oil derricks. Since we entertain the opinion that the amended complaint does not show on its face that the contracts were of such character that purely personal services were required thereby, it follows that we are not impressed by the argument that whatever good will attached to the decedent's business ceased to exist when he died. It may properly be observed that it is obviously not necessary here to decide whether or not decedent's business actually possessed that expectation of continued public patronage which is legally defined as good will in order to arrive at the conclusion that whatever good will it may have had did not necessarily vanish when the owner died. The question of whether the business possessed a good will is a question of fact to be determined upon the trial of the action. The question here presented is whether or not the amended complaint shows on its face that the business conducted by the deceased was of such a character that it must be declared that the intangible element of good will forever terminated when the decedent died. In this connection, it may be conceded that, if it can be declared as a legal proposition that the business of constructing oil derricks can never possess an expectation of continued public patronage, the question of whether such expectation of patronage could survive the owner's death is not presented. We think it is clear that it may not be declared that good will cannot as a matter of law attach to the business of building oil derricks. The builder of oil derricks is not an artist, although he may possess marked skill in the construction of these particular structures. Nor may it be said that he is engaged in a profession. It does not appear that an oil derrick is a structure that necessarily requires the employment of peculiar talent in its construction.

[9] With respect to the contention that the good will of the business in which the decedent was engaged could not survive by reason of the fact that the deceased was possessed of unusual skill and that the business was entirely dependent on such skill, it should again be observed that the amended complaint alleges that the respondent Clark Rig Building Company, under the control of respondents MacLeod and Trout, took over the property and business of the deceased after his death and completed all orders which were unfinished at the time of his death, and that it is further alleged that the Clark Rig Building Company during the 16-month period of its existence, did a gross business amounting approximately to \$2,000,000, the

profits from which enabled this corporation to pay dividends of \$2,500 per share on its outstanding capital stock in addition to very substantial salaries paid to its officers. These allegations indicate that the business was not so dependent on the skill of its owner that it came to an end when he died, but show, on the contrary, that it continued to exist and to yield very considerable financial returns. Since, therefore, the business was not so exclusively dependent on the owner's skill, experience, and reputation that it could be successfully carried on by others after his death, it may not be declared as a matter of law that the expectation of continued public patronage necessarily died with him. The aforesaid allegations strongly indicate, on the contrary, that the expectation of patronage survived and that it was amply fulfilled.

Respondents further contend that the judgment dismissing the action in conformity with the trial court's prior order sustaining the demurrers to the amended complaint without leave to amend must be affirmed, for the reason that the complaint shows on its face that the action was brought by the guardian, whereas the allegations contained in the pleading demonstrate that the cause of action was in the minor, and the action should therefore have been brought by the minor, through his guardian. Appellants concede that the amended complaint was vulnerable to the objection suggested, but point to the fact that in the second amended complaint which they requested permission to file the title of the action was correctly stated and the defect which is characterized as technical was thereby eliminated.

[10] The concession of appellants in this regard is proper. The allegations of the amended complaint show that the pleading attempted to state a cause of action for an accounting by the two heirs at law of Samuel Clark. It further appears that one of the heirs at law was a minor and that the other heir was his general guardian. The action should therefore have been brought by the minor through his guardian jointly with the other heir, the widow of Samuel Clark. *Fox v. Minor*, 32 Cal. 111, 91 Am. Dec. 566; *O'Shea v. Wilkinson*, 95 Cal. 454, 30 P. 588; *Dixon v. Cardozo*, 106 Cal. 506, 39 P. 857.

[11] The general rule that an order sustaining a demurrer to a pleading must be affirmed if it appears that there was any ground upon which the order could properly have been made might furnish a reason for affirming the judgment of dismissal. Ap-

pellants, however, have appealed, not only from the judgment, but from the trial court's order denying their motion for relief under section 473 of the Code of Civil Procedure, and refusing permission to file a second amended complaint. In this connection, it is pointed out that the judgment of dismissal was rendered without notice to appellants on the same date on which the order sustaining demurrers to the amended complaint was made and within a few hours subsequent to the hearing of arguments on the demurrers, and that thereby appellants were deprived of a reasonable opportunity to move for leave to file a second amended complaint prior to the entry of the judgment, for which reason they were compelled to move to vacate the judgment on the ground that it was rendered through inadvertence.

[12, 13] The record shows that the order sustaining demurrers to the amended complaint was made on October 14, 1932, and that on the same date the judgment of dismissal was signed by the trial court. There is no denial that the judgment was signed without notice to appellants. The circumstances presented would appear to justify application of the rule announced in *Metzger v. Vestal*, 76 Cal. App. 409, 418, 244 P. 942, 945. It is there stated: "The rule that a party, against whom an order has been entered sustaining a demurrer without leave to amend, must ask leave to amend in order to have the ruling reviewed on appeal, presupposes that the complaining party had an opportunity to ask such leave prior to the time of entry of judgment on the order. To hold otherwise would be to carry a technical rule to the extreme of absurdity." The fact that the original complaint filed in the action had been once amended would not of itself justify a refusal of permission further to amend. *Schaake v. Eagle, etc., Can Co.*, 135 Cal. 472, 63 P. 1025, 67 P. 759; *James v. Steifer Mining Co.*, 35 Cal. App. 778, 788, 171 P. 117. The notice of motion to vacate the judgment was given on October 20, 1932. The ground of the motion was stated to be inadvertence, and the affidavit filed in support of the motion alleges that the judgment was entered and filed without notice to appellants' counsel, who were thereby deprived of the opportunity to ask leave to amend. The order made by the trial court on November 14, 1932, whereby the motion to vacate the judgment was denied, shows that the trial court also then considered the motion as an application of appellants for leave to

amend, since the order recites that "plaintiff's motion to vacate and set aside judgment and for leave to file second amended complaint, heretofore submitted is now by the court denied." The above-cited decisions furnish ample authority to entertain the appeal from the judgment of dismissal, notwithstanding the fact that no application for leave to file a second amended complaint was presented prior to the entry of the judgment. The circumstances presented by the record indicate that appellants were deprived of an opportunity seasonably to apply for permission to amend.

[14] It is our conclusion that the order sustaining the demurrers for failure to show facts constituting a cause of action without leave to amend may not be sustained on the ground that the action should have been commenced by the minor through his guardian. This defect was remedied by the second amended complaint which the trial court should have permitted to be filed. The result which would be achieved by affirming the judgment dismissing the action would be that what appears to be a meritorious cause of action for an accounting for the misappropriation of valuable property rights might be entirely lost to the minor if the judgment is affirmed. Such action should be avoided if possible. *Dixon v. Cardozo*, supra.

Various objections on the grounds of uncertainty, indefiniteness, and ambiguity were urged by the special demurrers to the amended complaint. It is obvious that the order sustaining the demurrers was not based upon them but upon the ground that the pleading did not and could not be made to state a cause of action. Furthermore, the sustaining of special demurrers which are in aid of the pleading to which such demurrers are interposed would not justify the inclusion in the order of a refusal of permission to amend. We have heretofore indicated our opinion that the contentions advanced by respondents in support of the judgment are not impressive.

The judgment is therefore reversed, and the trial court is directed to overrule the general demurrers interposed by respondents for failure to state facts constituting a cause of action and to permit appellants to file the second amended complaint heretofore submitted by them. The attempted appeal from the order denying the motion for a new trial is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

5 Cal.App.2d 290

PEOPLE v. WALKER.

Cr. 284.

District Court of Appeal, Fourth District,
California.

March 16, 1935.

1. Larceny $\S$ 65

Evidence held sufficient to support conviction of grand theft by taking an automobile.

2. Criminal law $\S$ 829(9)

Refusal of defendant's instruction as to presumptions, on which jury was fully and completely instructed, was not error.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

James Hershel Walker was convicted of grand theft, and he appeals.

Affirmed.

Wilmer Breeden, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant Walker, R. A. Skeels, and R. F. Lemon were jointly charged with the crime of grand theft committed by taking a Ford coupé and, in a second count, with taking a Chevrolet coach. Prior convictions charged against each defendant were respectively admitted. While his codefendants were convicted on both counts, the appellant was convicted on the second charge only. This is an appeal from the judgment entered against him.

The Chevrolet car in question was stolen in the city of San Diego between 5:30 and 9:30 p. m. on the evening of October 29, 1934. Somewhere around 7 o'clock on that evening two boys observed two men fixing the hinges on the doors of a private garage in the rear of a vacant house which had been unoccupied for at least a year. One of the boys held a flashlight for the men so they could see to put in some screws, and at this time he "went a little ways in" the garage and saw a Chevrolet coach. He later saw this car when the officers came to the garage on November 1st. At the trial this boy identified Lemon as one of the men he saw that night, and while he thought the appellant was the other he was not certain of this. Between 4 and 5 o'clock on the afternoon of November 1, 1934, these boys saw the appellant and his codefendants

enter this garage and saw one of them take a green tool kit from a Ford coupé parked in the alley and carry it into the garage. They noticed that all three of the men were wearing gloves, that the garage door was kept shut and they heard sounds "like somebody hitting something" coming from the garage. They reported the matter to the police, and several officers arrived within a few minutes.

These officers found all doors to the garage locked on the inside, and, after gaining admittance, they found the three men with the stolen Chevrolet referred to. One wheel had been taken off, one side of the hood was up, the engine number was nearly obliterated, showing fresh file marks, fresh filings were directly underneath the number, and a file was laid against the fender on that side, with numerous other tools scattered around. A false and forged registration certificate was in the car, and there were two license plates which, it developed, had been taken from another car in another part of the city. The entire locking mechanism had been taken out of the switch, and there was a box with wires attached thereto, known as a "hot shot" or coil jumper, which is used in driving away an automobile when the ignition is locked. The Ford parked in the alley was the stolen car involved in the first count of the complaint, and after the officers arrived Skeels took a tool which he had in his hands to the Ford and placed it therein and took his coat therefrom. The wheels on that Ford had been changed and replaced with wheels of another color, and the engine number thereon had been completely changed, as had also the license plates and the registration slip. In that car was also found a complete set of dies appropriate for stamping such engine numbers on an engine after the original numbers have been removed. While the numbers on both of these engines had been removed, the cars were fully identified by secret numbers placed therein by the manufacturers.

While the explanations made by the appellant and his codefendants conflicted with each other and each was self-contradictory in many respects, their general story is as follows: Skeels, who had rented this garage under an assumed name shortly before this occurrence, testified that on October 29, a man whom he had never seen before asked him where he could rent a garage; that he told him he could use this garage and gave him a key; that on November 1 this man employed him to fix a spring in the knee action of the car; that he was not a mechanic and was ill

at the time; that he employed the appellant to assist him in making this repair; and that while they were doing so the police arrived. The appellant testified that Skeels asked him to help him do this work, telling him there was something in it for both of them, and that they started the work about four o'clock in the afternoon. He also testified that he was not a mechanic and knew nothing about this sort of work. Lemon testified that he merely dropped in to watch because he knew the other two would be working there.

[1] The first point raised is that the evidence is not sufficient to support the judgment, it being argued that there is nothing to indicate guilt on the part of the appellant except the fact that he was present in the garage; that the garage had been leased by Skeels and that, therefore, the appellant was not in possession of the car; and that his explanation of his presence there is so reasonable that it removes any possible inference of guilt. The facts above set forth are a sufficient answer to these contentions and, with the reasonable inferences therefrom, amply support the verdict and judgment. Under the circumstances, the fact that the jury found itself unable to accept the appellant's explanation is not surprising.

It is next urged that the court erred in denying a motion for a new trial. This is based upon the proposition that the evidence is not sufficient to sustain a conviction and requires no further consideration.

[2] The refusal to give a certain instruction at the request of the appellant is assigned as error. The instruction related to the matter of presumptions, and the jury was fully and completely instructed on that subject. Nor can it reasonably be supposed that the instruction, if given, could have had any effect on the verdict. The appellant also takes one clause from another instruction and argues that it amounts to a direction to find the appellant guilty. Taken as a whole, the instruction not only was proper, but was in favor of the appellant, and no reasonable juror could read into the language used the meaning now assigned to it by the appellant.

From a reading of the entire evidence we are unable to see how the jury could have reached any other conclusion, and we are far from convinced that a miscarriage of justice has occurred.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

5 Cal.App.2d 29

KENNEDY v. MOYER et al.

Civ. 9341.

District Court of Appeal, Second District,
Division 2, California.

Feb. 28, 1935.

1. Appeal and error ⚡931(1)

On appeal, court must view evidence in light most favorable to respondents.

2. Guaranty ⚡54

Lessor's mere gift to lessee of part of rent from month to month as it becomes due is not material alteration of written contract such as releases guarantor thereon.

3. Guaranty ⚡54

Guarantor of lessee's performance of agreement in written lease to pay lessor certain sum monthly for year held not released from obligations thereunder by parties' subsequent oral executed agreement reducing amount of monthly payments without guarantor's consent.

Appeal from Superior Court, Los Angeles County; Wm. J. Palmer, Judge.

Action by R. B. Kennedy against George L. Moyer, Thomas O. Long, and Stephen G. Long. From a judgment against defendants Moyer and Thomas O. Long in an unsatisfactory amount and for defendant Stephen G. Long, plaintiff appeals.

Affirmed as to first named defendants, and reversed as to defendant Stephen G. Long.

Lloyd W. Moultrie, of Los Angeles, for appellant.

O. Roy Smith, of Long Beach, and D. H. Laubersheimer, of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal from a judgment in an action brought to recover installments of rent which were alleged to be due the plaintiff under a written lease whereby two of the defendants had agreed to pay a certain sum per month for years and the third defendant, Stephen G. Long, had guaranteed the same. It was alleged by the defendants that the lessor and the lessees entered into a subsequent oral executed agreement whereby the amount of the monthly payments was reduced. The trial court found that such oral agreement was entered into and that it was fully executed during the period commencing May 1, 1931, and ending October 31, 1932, and

the court therefore refused to give judgment in favor of the plaintiff for the excess between the amounts paid and the amounts to be paid under the written lease during said period, although it gave judgment based on the full amounts designated in the written contract for the remainder of the period covered by the lease.

[1] It is the first contention of the appellant that the evidence is insufficient to support the findings as to the subsequent oral executed agreement. It is our duty, of course, on appeal to view the evidence in the light most favorable to the respondents. We have reviewed the evidence, and we find that there is substantial evidence to sustain the findings. The judgment against George L. Moyer and Thomas O. Long is therefore affirmed.

[2, 3] However, on the above facts the court concluded that "the defendant Stephen G. Long was released from any obligation under the lease by the alterations in its terms as above stated, made without his consent, and that he is entitled to judgment for his costs." Appellant contends that the court erred in so ruling. The respondents contend "that any modification of an original contract which works some change in the rights, interests, or obligations of the parties, whether beneficial or detrimental, operates to release a guarantor, * * *" and they rely upon the case of Julian v. Gold, 214 Cal. 74, 3 P.(2d) 1009, 1010. They say that "the foregoing case holds that in so far as such an oral agreement is executed it constitutes a binding and valid modification of a written lease." It is true that the court does make the following quotation from 43 A. L. R. 1458: "It is a rule established by many well-considered cases that parties to a lease cannot escape from their secondary (modifying) agreement on the ground of want of consideration, where it has been fully executed. * * *" But this falls far short of sustaining the respondents' contention. The thesis of the opinion in the Julian Case is that no consideration is necessary for an executed oral agreement reducing installments of rent; and for that purpose and to that extent only it overrules or distinguishes certain cases which hold that a consideration is necessary, declaring with regard to the former cases "that the statement that a consideration is necessary is purely obiter." But a careful reading of the opinion will clearly show that such an oral executed agreement is valid, not because it modifies the written

lease, but because (using quotations from that case) "the lessor will be regarded as having made a valid gift to the tenant of the difference," and because such an agreement is a "waiver of rent, where the transaction is carried out, it being a mere voluntary relinquishment of a known right," and because "a reduction accomplished periodically as the rent accrues, by accepting a sum less than the stipulated rent for such period, is valid and constitutes an executed gift," and because "a pure gift, fully executed, is valid," and because, "to the extent that it was so executed, it became a closed incident." The opinion also quotes with approval from the Sinnige Case, 170 Cal. 55, 148 P. 203, 204, as follows: "Concessions of the kind * * * are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent where no such change of terms has been made in writing." A mere gift from the lessor to the lessee of a part of the rent from month to month as it becomes due is not a material alteration of a written contract such as to release a guarantor thereon, and the contention that the facts in the instant case are such as to release the guarantor does not meet with our approval. The judgment in favor of Stephen G. Long is therefore reversed, with instructions to the trial court to enter judgment in favor of the plaintiff and against the said defendant for the same amount as the judgment heretofore given against the other defendants.

Judgment affirmed and reversed as above indicated; appellant to recover his costs.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



5 Cal.App.2d 204

CALIFORNIA MUT. CO. v. VOIGT et al.

(two cases).

Civ. 5270, 5271.

District Court of Appeal, Third District,
California.

March 9, 1935.

1. Specific performance §116

In vendor's action for specific performance of contracts to purchase realty, answer pleading misrepresentations as to improvements to lots held not demurrable.

2. Vendor and purchaser §42

Clauses in contract which stated that purchasers had inspected lots, and relied on their own information and knowledge with respect thereto and not on representations of grantor, and that any alleged misrepresentations or fraud on part of grantor were waived held not to waive any alleged misrepresentations knowingly made which might induce purchasers to buy property.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt and H. Parker Wood, Judges.

Actions by the California Mutual Company against Emilie L. Voigt and others in which certain defendants filed a cross-complaint. From a judgment sustaining a general demurrer to the answer and special demurrer to special defense, defendants Emilie L. Voigt and others appeal.

Reversed with directions.

Eugene Kelly, of Los Angeles, for appellants.

Robert S. Fisher, of Los Angeles, and Pinney & Lockwood, of Hollywood, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from judgments which were rendered against them in an action for specific performance of three contracts to purchase certain lots in Los Angeles. The complaint sought to compel the payment of the balance of the purchase price of the lots according to the terms of the agreements. A general demurrer to the second amended answer was sustained. The defendants refused to amend their pleading, and judgment was rendered against them for specific performance of the contracts. The defendants have also appealed from a separate judgment which was rendered against them in the same suit, sustaining a special demurrer to their cross-complaint or special answer to the complaint which charges the plaintiff with procuring the contracts to purchase the lots by the exercise of fraud.

The complaint is couched in three separate causes of action based upon three separate contracts for the sales of different lots. The contracts are attached to the complaint as exhibits and made a part thereof. The complaint alleges that the plaintiff was the owner of lots 86, 97, 192, and 193 of tract 8077 of

Los Angeles, according to the map of that tract on file in Los Angeles county; that lot 97 was sold on contract to the defendants Emilie, Anna, and Esther Voigt, October 19, 1927, for the sum of \$2,750, and that \$1,666.46 of the purchase price thereof still remains unpaid, together with interest thereon from March 1, 1932; that lot 86 was sold on contract to all four of the defendants, November 1, 1927, for \$2,750, and that \$1,666.46 of the purchase price remains unpaid, together with interest thereon from March 1, 1932; that lots 192 and 193 were sold on contract to Emilie, Anna, and Esther Voigt, October 16, 1927, for the sum of \$15,000 and that \$9,251.48 of the purchase price remains unpaid, together with interest from February 17, 1932. It is then alleged that the lots are reasonably worth the sums for which they were sold; that the defendants "failed, defaulted, neglected and refused to pay" the balances of the purchase prices of their respective lots, and that they have "in writing, repudiated their obligations upon the said contract"; that the plaintiff has tendered to the purchasers of the lots, deeds of conveyance thereto, to be delivered upon the payments of the balances due thereon, but that the defendants have failed and refused to accept the deeds or pay the balances due upon the purchase prices thereof. It is then alleged that counsel fees in the sum of \$750 and other expenses have been incurred on account of the defendants' default, and specific performance of the contracts is sought to compel the payment of the balances due according to the terms of the contracts, together with costs and counsel fees.

The second amended answer specifically denies each and every material allegation of the complaint. As a further and separate answer to the complaint, it is affirmatively alleged in the same pleading that the contracts to purchase the real property were procured by fraud and misrepresentations, among which it is specifically charged that the plaintiff and its agents falsely represented that water mains, gas mains, and an electric system were installed underground in the street opposite the lots, and that those utilities would be available to the purchasers for the benefit of the lots, but that these improvements had not in fact been so installed as the plaintiff well knew, and that the defendants were thus damaged to the full amount of the unpaid portion of the purchase prices of the lots. The answer then prayed that the plaintiff take nothing by its suit. This special defense was termed a cross-complaint.

A general demurrer to the answer was sustained. The defendants refused to amend

their pleading, and judgment for specific performance was rendered against them. A special demurrer to the special defense of fraud on the grounds of uncertainty and laches and the alleged expiration of the statute of limitations was also sustained and a separate judgment was entered dismissing that defense to the action and rendering judgment against the defendants. From these separate judgments, the defendants have appealed.

[1] The general demurrer to the second amended answer was erroneously sustained. Every material allegation of the complaint was controverted. These specific denials raise issues constituting a good defense to the complaint which require a trial on the merits of the cause. *The Snipsic Company v. Smith*, 7 Cal. App. 150, 93 P. 1035; *Tustin Pkg. Co. v. Pac. Coast Fruit Auction Co.*, 21 Cal. App. 274, 131 P. 338; 6 *Standard Encyc. of Proc.*, p. 993, § D-4.

[2] The demurrer to the special defense of fraud also states a good defense to the complaint on that ground. It is not uncertain, but, on the contrary, is very specific in the allegations of fraud upon which the defendants rely. It does not appear from the pleadings the defendants are guilty of laches or that the statute of limitations has run against them. The contracts to purchase the real property contain clauses which the answer asserts were fraudulently inserted therein, to the effect that the purchasers of the property have inspected the lots, and rely upon their own information and knowledge with respect thereto and not upon the representations of the grantor, and that any alleged misrepresentations or fraud on the part of the grantor is therefore waived. Undoubtedly, the trial court deemed this clause of the contracts to be a complete waiver of the alleged defense of fraud contained in the special defense of the cross-complaint, and sustained the demurrer thereto on that account. It has been definitely held, contrary to the rule which formerly prevailed in this jurisdiction, that a party who has been defrauded by misrepresentations knowingly made which induce him to purchase property, may rescind the contract notwithstanding the existence of a clause therein which purports to waive any alleged misrepresentations or fraud with relation thereto, on the theory that one who has procured a contract by means of fraud may not profit by his own wrong. *Speck v. Wylie* (Cal. Sup.) 36 P.(2d) 618, 95 A. L. R. 760; *Lozier v. Janss Inv. Co.* (Cal. Sup.) 36 P.(2d) 620; *Restatement of the Law of Agency*, § 259. The demurrer to the special defense of fraud

or the cross-complaint, as it is termed, was also erroneously sustained.

The judgments are reversed, and the court is directed to overrule the general and special demurrers and proceed to try the cause on its merits.

We concur: PULLEN, P. J.; PLUMMER, J.



**POLLOCK v. INDUSTRIAL ACCIDENT
COMMISSION OF CALIFORNIA**
et al. *
Civ. 10251.

District Court of Appeal, Second District,
Division 1, California.
March 12, 1935.

Rehearing Denied April 9, 1935.
Hearing Granted by Supreme Court
May 8, 1935.

1. Master and servant ⇨416½

Petition for order of Industrial Accident Commission directing insurance carrier to pay unpaid amount due on award in compensation proceeding which required payment of an ascertained sum of money held properly denied, since statutory remedy requiring entry of judgment in superior court and execution thereon is clear and complete (St. 1917, p. 851, § 21).

2. Master and servant ⇨416½

Where award of Industrial Accident Commission in compensation proceeding does not require the payment of an ascertained sum of money, commission must make some further order to fix sum before judgment upon award may be entered in superior court and execution issued thereon (St. 1917, p. 851, § 21).

3. Master and servant ⇨416½

In compensation proceeding, claimant's petition to Industrial Accident Commission for an order directing insurance carrier to pay any unpaid part of award previously made held properly denied, since order, if granted, would add nothing to terms of award which contained same order (St. 1917, p. 851, § 21).

Proceeding under the Workmen's Compensation Act by Saul Pollock, by Morris Pollock, his guardian ad litem, claimant, opposed by the Plumbing Sheet Metal Products Company, employer, and the Great American In-

demnity Company, insurance carrier. To review an order of the Industrial Accident Commission of the State of California denying claimant's petition for an order directing insurance carrier to account for and pay over to petitioner amounts claimed owing under award previously made, claimant filed petition for writ of review.

Denied.

Harry Sherr, of Los Angeles, for petitioner.

Everett A. Corten and Arthur I. Townsend, both of San Francisco, for respondent Industrial Accident Commission.

CONREY, Presiding Justice.

An award of compensation on account of disability resulting from an industrial injury was made by the Industrial Accident Commission in favor of petitioner, against the insurance carrier of petitioner's employer. The indemnity company (insurance carrier), on request by petitioner, paid certain installments of the award by depositing those sums to the credit of petitioner in a savings account which petitioner had opened with a building and loan association. At all times of the foregoing transactions, petitioner was a minor under the age of 18 years. His age is now only twenty years.

Seeking to disaffirm or repudiate the payments thus made (the building and loan institution having become insolvent), petitioner made application to the commission for an order directing the insurance carrier to account for and pay over to petitioner or to his guardian ad litem, the amount thus claimed as owing under said award and remaining unpaid. The commission having made its order denying said petition, the claimant applies to this court for a writ of review of said order.

[1, 2] The application as made to the commission did not call for any modification of the award. If, as claimed by petitioner, the amount due under the award remains unpaid, the procedure for collection would be as provided by section 21 of the Workmen's Compensation Act of 1917 (St. 1917, p. 851). Under that procedure, judgment upon the award is entered in the superior court, and execution thereon may issue. *Vickich v. Superior Court*, 105 Cal. App. 5St, 288 P. 127. If the award to which the present proceeding applies had the form of an order other than one requiring the payment of an ascertained sum of money, it might be necessary for the commission to make some further order, such

as was made in the Blankenhorn Case (S. F. No. 12404 of the Supreme Court), referred to in United States Fidelity, etc., Co. v. Dept. of Industrial Relations, 207 Cal. 144, 152, 277 P. 492. The claim being thus reduced to a form which could be followed by judgment and execution, the remedy would be clear and complete. In the present case, however, no such intermediate procedure by the commission is necessary.

[3] As first herein stated, applicant's petition asked for an order that the insurance carrier pay any unpaid part of the award. But such order, even if granted, would add nothing to the terms of the award, containing the same order. Llewellyn Iron Works v. Ind. Acc. Commission, 129 Cal. App. 449, 453, 18 P.(2d) 975.

The petition for writ of review is denied.

We concur: HOUSER, J.; YORK, J.



5 Cal.App.2d 146

HARRIS v. CITY OF PIEDMONT.

LANGSTROTH et al. v. SAME.

Civ. 8820.

District Court of Appeal, First District,
Division 2, California.

March 6, 1935.

Hearing Denied by Supreme Court
May 3, 1935.

1. Municipal corporations ☞601

Ordinance held not invalid merely because creating numerous small zones indiscriminately scattered throughout city, frequently consisting of only one lot.

2. Municipal corporations ☞601

That one of two business districts created by zoning ordinance contained no vacant lots available for store buildings did not alone invalidate ordinance where other business district was only partly built up and where ordinance created numerous small zones apparently unoccupied.

3. Trial ☞404(2)

Finding that zoning ordinance made insufficient provision to satisfy needs of people for various uses restricted to certain zones held merely conclusion and would be disregarded on appeal.

4. Appeal and error ☞934(2)

Appellate court should construe findings to support judgment.

5. Appeal and error ☞837(1)

To construe findings, appellate court may examine pleadings and even bill of exceptions.

6. Appeal and error ☞909(6)

Presumption on appeal from judgment upholding zoning ordinance is that ordinance made sufficient provision to satisfy needs of people for various uses permitted solely in designated zones.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Two separate actions by H. S. Harris, and by Lorraine Langstroth and others, against the City of Piedmont were consolidated for trial. After the city appealed from a judgment for plaintiff in the first action, such action became moot. From a judgment for the city in the second action, plaintiffs therein appeal.

Affirmed.

Breed, Burpee & Robinson, of Oakland, for appellants Langstroth et al. and respondent Harris.

Girard N. Richardson and Joseph C. Prior, both of Oakland, for respondent city of Piedmont.

STURTEVANT, Justice.

Two different actions were commenced for the purpose of obtaining declaratory relief. By stipulation of the parties, the two actions were consolidated for the purposes of trial. Harris v. City of Piedmont has become a moot case and in what follows we will not address ourselves thereto.

Heretofore the city of Piedmont, in the order stated, adopted zoning Ordinances No. 196, No. 268, and No. 315. According to its terms, the second repealed the first. In like manner No. 315, the last one, repealed the second. Counsel do not contend to the contrary. The record presents nothing for our consideration except the provisions of Ordinance No. 315. The trial court found:

"That at all times herein mentioned, plaintiffs were, ever since have been and now are the owners of that certain parcel of real property situate in the City of Piedmont, County of Alameda, State of California, described as follows. to-wit: (Here follows description).

"That at all times herein mentioned defendant was, ever since has been and now is a municipal corporation organized and existing under and by virtue of the laws and Constitution of the State of California.
* * *

"That on or about March 21, 1929, the City Council of the City of Piedmont did adopt Ordinance No. 315, entitled:

"'An ordinance providing for the creation in the city of Piedmont of four zones consisting of various districts and prescribing the classes of buildings, structures and improvements in said several zones, and the use thereof: defining the terms used therein, prescribing the penalty for the violation of the provisions hereof and repealing Ordinance Nos. 196 and 268;' a copy of which ordinance is attached to the complaint on file herein, marked 'Exhibit A', incorporated herein by reference and referred to for further particulars. That said ordinance does not make sufficient provision to satisfy the needs of the people of the City of Piedmont for the various uses and purposes permitted solely in Zones 'C' and 'D.' * * * That by the terms of said ordinance two business districts are created, one in Upper Piedmont at and near the intersection of Highland and Vista Avenues (hereinafter referred to as 'Highland Business District'), and the second in Lower Piedmont on Grand Avenue near and adjacent to the boundary line between the City of Piedmont and the City of Oakland (hereinafter referred to as 'Grand Avenue Business District'). That said two business districts are so separated by difference in elevation, by street alignment and by distance as to be non-competitive, and serve distinct and separate portions of the City of Piedmont.

"That said Highland Business District, excepting property owned and devoted to public use, is entirely owned by one corporation. That said Highland Business District is completely occupied by one gasoline service station, one bank, one real estate office, one grocery store, one delicatessen shop, one butcher shop and one candy store, and that there is no room available for expansion of said Highland Business District within the zone or zones in which business is permitted under the terms of said ordinances or any of them.

"That a monopoly of ownership and a monopoly of use exists in said Highland Business District. That the portion of said Grand Avenue Business District not at the present time occupied for business purposes is unsuited for business development.

"That said Ordinance No. 315 creates a large number of small zones constituting Zones 'C' and 'D', indiscriminately scattered over the entire City of Piedmont, frequently consisting of not more than one lot.

"That the Charter of the City of Piedmont, Section 41 thereof, by amendment duly adopted on January 18, 1927, provides, with reference to the zoning system of the City of Piedmont, as follows:

"'The City of Piedmont is hereby declared to be primarily a residential city and the Council shall have power to establish such zoning system within the City as may in its judgment be most beneficial and in such zoning systems may prohibit the erection or maintenance of any class or classes of buildings within said areas and may classify and reclassify the zones established, but no zones now existing shall be reduced or enlarged with respect to size or area, and no zones shall be reclassified without submitting the question to a vote of the electors held at a general election or a special election to be called for the purpose, and no zone shall be reduced or enlarged and no zones reclassified unless a majority of the voters voting upon the same shall vote in favor thereof.

"'The Council may also prescribe the character of materials and method of construction of buildings erected within any zone area and may establish such set back lines as it may consider necessary and proper.'

"That at all times herein mentioned, Ralph H. Barrett was, ever since has been and now is the Building Inspector of the City of Piedmont.

"That on or about July 19, 1929, plaintiffs herein did file with the said Ralph H. Barrett, as Building Inspector of the City of Piedmont, their complete and detailed plans and specifications for the erection upon the real property described in finding I hereof of a building designed and intended for the purpose of housing retail stores, and that plaintiffs did tender and duly offer to pay on said day to Ralph H. Barrett, as Building Inspector of the City of Piedmont, the sum of Seventy Dollars (\$70.00), which sum was and is the full amount of the permit fee required under the terms of the Building Ordinance of the City of Piedmont for said store building. That said Ralph H. Barrett, as Building Inspector of the City of Piedmont, did refuse to receive said sum of Seventy Dollars (\$70.00), and did refuse to issue a permit for the erection of said store building, solely and exclusively upon the ground that the erection of said store

building upon plaintiffs' property was not permitted under the terms of said Ordinance No. 315.

"That immediately after said due offer of payment of said sum of Seventy Dollars (\$70.00), plaintiffs did deposit said sum in the name of 'Ralph H. Barrett, Building Inspector of the City of Piedmont', with the American Trust Company, Fourteenth and Broadway Branch, Oakland, California, which said bank and branch is a bank of deposit of good repute in the State of California; and that on the 20th day of July, 1929, plaintiffs did give notice of such deposit to Ralph H. Barrett, as Building Inspector of the City of Piedmont.

"That on July 19, 1929, plaintiffs did enter into a binding contract to erect upon the real property described in finding I hereof a store building, in accordance with the plans and specifications filed with the Building Inspector of the City of Piedmont, as aforesaid.

"That an actual controversy relating to the legal rights and duties of the respective parties to this action exists.

"That plaintiffs' property is situate on Highland Avenue, in the upper portion of the City of Piedmont, four blocks northwesterly of said Highland Business District. That between said Highland Business District and said property of plaintiffs, both sides of said Highland Avenue are completely occupied by homes used for residential purposes, and that between said Highland Business District and said property of plaintiffs there is no commercial or store usage whatsoever. That said property of plaintiffs is situate within the upper portion of said City of Piedmont and within the area tributary to said Highland Business District. That said property of plaintiffs is not within any reasonable or logical extension of either said Grand Avenue Business District or said Highland Business District.

"Conclusions of Law.

"Let judgment be entered in accordance with these findings."

The findings were signed on the 16th day of January, 1932. On the same day a judgment was signed which is as follows:

"Wherefore, by reason of said findings of fact and conclusions of law,

"It is ordered, adjudged and decreed that Ordinance No. 315 of the City of Piedmont is a valid ordinance in so far as the same affects the following described real property situate in the City of Piedmont, County of Alameda, State of California, described as follows, to-wit: (Same description as in Findings.)" The

plaintiffs contend: "The court determined that the ordinance was void for three reasons: (a) It failed to make sufficient provision to satisfy the needs of the City of Piedmont for commercial purposes; (b) It created a monopoly of both ownership and use; (c) It created a large number of small zones indiscriminately scattered over the entire City of Piedmont, frequently consisting of not more than one lot." Before taking up the contention of the plaintiffs, the contents of their complaint should be considered. They alleged that they were the owners of the property described in the findings; that the defendant is a municipal corporation; and that on March 21, 1929, the city council adopted Ordinance No. 315 which they attach to their complaint. They then alleged: "That said ordinance does not make sufficient provision to satisfy the needs of the people of the City of Piedmont for the various uses and purposes permitted solely in zones 'C' and 'D'. That said ordinance creates a large number of small zones constituting zones 'C' and 'D' indiscriminately scattered over the entire City of Piedmont, frequently consisting of not more than one lot, and without reference to the public health, safety, or general welfare of the people of the City of Piedmont." Continuing, they alleged that Ralph H. Barrett was the building inspector; that on July 19, 1929, plaintiffs applied for a permit to build a store building, tendered the fee required, that the fee was refused for the reason that the erection of the building on their lot would be in violation of the provisions of Ordinance No. 315; that on the refusal to accept said tender they deposited the fee for the defendant's account; that on the same day they entered into a binding contract for the erection of their building in accordance with plans and specifications duly filed; that the contractors had commenced the erection of said building; and "that an actual controversy relating to the legal rights and duties of the respective parties to this action exists. That said Ordinance No. 315 is a written instrument and that plaintiffs are interested under the same and desire a declaration of their rights and duties with respect to the City of Piedmont, and in respect to said real property." In their prayer they asked that the court adjudge Ordinance No. 315 void. However, it will be noted that in no place in the complaint was it alleged the plaintiffs contended that Ordinance No. 315 was void and that the defendant contended it was valid and that such disagreement constituted an actual controversy relating to the legal rights and duties of the respective parties to said action.

[1-6] Taking up the attacks made on the findings, it clearly appears they have no merit. The fact that Ordinance No. 315 "created a large number of small zones, indiscriminately scattered over the entire City of Piedmont, frequently consisting of not more than one lot," did not make it invalid. *Feraut v. City of Sacramento*, 204 Cal. 687, 269 P. 537. The fact that Highland business district is now built up and no vacant lots are available on which store buildings may be constructed is not determinative when we note that Ordinance No. 315 created "a large number of small zones" no part or portion of which seem to be occupied and Grand avenue business district which is only partly built up. It is asserted the trial court determined that Ordinance No. 315 was void. It did not do so. Nor did any issue made by the pleadings call for a finding on that subject. The finding that said ordinance "does not make sufficient provision to satisfy the needs of the people of the City of Piedmont for the various uses and purposes permitted solely in Zones 'C' and 'D'" was but a conclusion and on appeal will be disregarded. *Wayt v. Patee*, 205 Cal. 46, 53, 54, 269 P. 660. That the trial court did not intend to make a finding that Ordinance No. 315 was void is shown by the recital in the judgment " * * * that Ordinance No. 315 of the City of Piedmont is a valid ordinance. * * * " The two documents were signed on the same day and presumptively at the same time. By an unbroken line of authority, this court should so construe the findings as to support the judgment. To construe the findings, we may examine the pleadings and even a bill of exceptions. *Leist v. Dierssen*, 4 Cal. App. 634, 88 P. 812. Turning to the record, it is clear no evidence was before the trial court showing that said ordinance did not "make sufficient provision to satisfy the needs," etc. In re Application of *Ruppe*, 80 Cal. App. 629, 252 P. 746. The presumption is that it did. *Smith v. Mathews*, 155 Cal. 752, 756, 103 P. 199. Therefore we think it may not be said, after an examination of the entire cause, including the evidence, that any asserted error has resulted in a miscarriage of justice.

The judgment is affirmed.

I concur: NOURSE, P. J.

SPENCE, Justice.

I concur in the judgment. Despite the state of the pleadings and findings, a review of the record shows that the evidence was insufficient to establish the invalidity of Ordinance

No. 315. Said ordinance was adopted after Ordinance No. 268 had been declared invalid in *Wickham v. Becker*, 96 Cal. App. 443, 274 P. 397, and it materially increased the area zoned for business purposes. The most that may be said concerning the evidence here is that it showed that reasonable minds might differ as to the propriety and necessity of restricting business development to the zones specified for that purpose in said Ordinance No. 315. Under these circumstances, the legislative determination of the propriety and necessity of such restriction is conclusive and such legislative determination may not be set aside by the courts. *Miller v. Board of Public Works*, 195 Cal. 477, at page 490, 234 P. 381, 38 A. L. R. 1479. It therefore appears that the judgment declaring said ordinance valid should be affirmed. Const. art. 6, § 4½.



5 Cal.App.2d 86

HODGES v. GONZALES et al.
Civ. 1433.

District Court of Appeal, Fourth District,
California.

March 4, 1935.

Rehearing Denied March 28, 1935.

Hearing Denied by Supreme Court
May 3, 1935.

1. Automobiles ⇨211

Where engine stopped and automobile coasted to stop with left wheels on edge of 20-foot pavement and right wheels near ditch, motorist who, having found that distributor gears were stripped, was standing beside automobile when truck collided therewith held not contributorily negligent under statute relating to parking on pavement (St. 1931, p. 2128, § 136 (a)).

2. Appeal and error ⇨1008(1)

Whether motorist, having found that distributor gears were stripped, causing engine to stop and preventing it from being started, was contributorily negligent in standing on pavement beside automobile, left wheels of which were on edge of pavement, when truck hit automobile, held fact question for court in trial without jury.

3. Appeal and error ⇨1010(1)

Court's findings supported by evidence in trial without jury cannot be disturbed on appeal.

4. Appeal and error ⇨1071(1)

That fact finding has been misplaced and appears among conclusions of law does not warrant reversal of judgment.

5. Appeal and error ⇨1149

Where court rendered judgment for plaintiff for specified sum, failure to find amount to which plaintiff was entitled for personal injuries *held* error correctible on appeal (Code Civ. Proc. § 956a).

6. Damages ⇨132(3)

\$1,500 for basal skull fracture, fractured fibula, and compound contusions over head and body, confining plaintiff to hospital for 11 days and to bed for 76 days additional, *held* supported by evidence.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Denver Hodges against J. J. Gonzales and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Walter E. Barry, of Los Angeles, for appellants.

F. H. Nottbusch, of San Diego, for respondent.

MARKS, Justice.

On September 4, 1931, plaintiff and his wife were traveling west in their automobile on Orangethorpe avenue in Orange county. Shortly after 5 o'clock in the afternoon the engine stopped and the car coasted to a stop with its left wheels just on the north edge of a 20-foot pavement, which pavement was in the center of the highway. Its right wheels were near the south edge of a ditch on the north side of the pavement.

Plaintiff was an automobile mechanic. He alighted from the stalled car, walked to its side, raised the hood, and hunted for the trouble. He found that the distributor gears had been stripped which caused the engine to stop and prevented its being started again. While he was standing on the left side of the car looking at the engine, a truck owned by J. J. Gonzales and being driven by E. Artiaga, his employee, and who was acting within the scope of his employment and on his master's business, approached the stalled automobile from the east. Artiaga drove so close to the automobile that the truck struck its left rear fender and plaintiff was thrown to the pavement and seriously injured. He suffered a basal fracture of the skull, a fracture of the

right fibula, and compound contusions over his head and body. He was confined in a hospital for eleven days when he was removed to his home where he was confined to his bed until November 30, 1931. At the time of the trial on July 12, 1932, he was still suffering from pains in his head.

The case was tried by the court without a jury, and judgment was rendered in plaintiff's favor in the sum of \$1,717. Defendants have appealed from the judgment.

Defendants urge the following grounds for a reversal of the judgment: (1) That plaintiff was guilty of contributory negligence in parking his car partly on and partly off the paved portion of the street in violation of the provisions of subdivision (a) of section 136 of the California Vehicle Act (St. 1923, p. 561, as amended by St. 1931, p. 2128). (2) That the plaintiff was guilty of contributory negligence as a matter of law in standing on the paved portion of the street in the path of a plainly visible approaching motor vehicle. (3) That the trial court failed to find on the defense of contributory negligence. (4) That as the trial court did not find the amount of damages to which plaintiff was entitled for his personal injuries it was error to award him any damages for such injuries.

[1] The first contention of defendants is resolved against them by the provisions of subdivision (a) of section 136 of the California Vehicle Act as construed in *Silvey v. Harm*, 120 Cal. App. 561, 8 P.(2d) 570; *Smith v. Pacific Greyhound Corp.*, 139 Cal. App. 696, 35 P.(2d) 169; and *McMillan v. Thompson*, 140 Cal. App. 437, 35 P.(2d) 419.

[2,3] The second ground of reversal presents a question of fact to be decided by the trial court. It having resolved that question against defendants and there being evidence to support its conclusion on that question, this conclusion cannot be disturbed on appeal.

[4] It is true that in the findings of fact there is no finding on the defense of contributory negligence. In the conclusions of law there is a finding absolving plaintiff from contributory negligence. Because a finding of fact has been misplaced and appears among the conclusions of law, it furnishes no ground for a reversal of the judgment. *Collins v. Ramish*, 182 Cal. 360, 183 P. 550; 24 Cal. Jur. 961.

[5,6] The trial court did not find the amount of damages to which plaintiff was entitled for his personal injuries. This constitutes error which may be corrected on appeal

Section 956a, Code Civ. Proc. The total judgment is for \$1,717. The trial court found in detail the items of special damage which totaled \$217. By simple process of subtraction it appears that general damages were awarded in the sum of \$1,500. It also appears from the reporter's transcript that at the end of the trial the trial judge announced that he would award plaintiff \$1,500 general damages and the items of special damage totaling \$217. There can be no question that the finding if made by the trial court would have fixed these damages at \$1,500. A review of the record convinces us that the damages fixed in the conclusions of law and judgment find ample evidentiary support.

It is ordered that the following be added to finding No. 5: "That the court further finds that as a result of his said injuries plaintiff was confined to a hospital for eleven days and to his bed for an additional period of seventy-six days and was caused to suffer and still suffers serious pain and was damaged thereby in the sum of \$1500.00."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



5 Cal.App.2d 183

MORRISSEY v. KIRKELIE.

Civ. 8743.

District Court of Appeal, Second District,
Division 1, California.

March 8, 1935.

Hearing Denied by Supreme Court
May 6, 1935.

1. Negligence ⇨93(1)

Negligence of automobile driver is not imputed to passenger who has no control over the automobile and bears no such relation to its use as to warrant assumption that passenger is jointly engaged with driver in operation thereof, notwithstanding common purpose in making the trip.

2. Negligence ⇨93(1)

Negligence of driver and owner of automobile could not be imputed to occupant merely because collision happened on parties' return from trip to file notice of their intention to marry, though marriage had taken place before trial of occupant's action against other motorist involved in collision.

3. Husband and wife ⇨260 Negligence ⇨93(2)

Wife's recovery for personal injuries sustained before marriage held not community property so as to make negligence of husband before marriage imputable to wife, in wife's action against third party.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Margaret Morrissey against O. A. Kirkelie. From a judgment for plaintiff, defendant appeals.

Affirmed.

W. I. Gilbert, Kenneth Keeper, and W. I. Gilbert, Jr., all of Los Angeles, for appellant.

Le Roy M. Edwards, M. M. Sattinger, and O. C. Sattinger, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

[1, 2] This is an appeal by defendant in an automobile collision case. The only question is one of imputed negligence. Plaintiff rode from Los Angeles to Ventura in an automobile belonging to and driven by her fiancé. In Ventura they filed a notice of intention to marry, having made the trip for that purpose. On the way home they collided with another automobile. Plaintiff did not drive or control or direct the driving of the car; in fact, did not know how to drive. The court declined to instruct the jury on the doctrine of joint enterprise and imputable negligence upon the ground that under the undisputed facts the negligence of the driver could not be imputed to plaintiff. This ruling is urged as a ground for reversal of the judgment. The question is not an open one in this state. The negligence of an automobile driver is not to be imputed to a passenger who has no control over the car in fact, and who does not bear such a relation to the use of the vehicle as to warrant the assumption that he is jointly engaged with the driver in the operation thereof. The fact that they have a common purpose in making the trip is not, alone, sufficient. It is unnecessary to discuss the authorities further than to say that they uniformly adhere to this rule. *Bryant v. Pacific Electric Ry. Co.*, 174 Cal. 737, 164 P. 385; *Pope v. Halpern*, 193 Cal. 168, 223 P. 470; *Wessling v. Southern Pacific Co.*, 116 Cal. App. 455, 3 P.(2d) 25, and cases cited therein.

[3] The further point is urged that the negligence of the driver is imputable to plaintiff

because they were husband and wife at the time of trial. Plaintiff's recovery is not community property, since her rights thereto accrued before marriage. The rule that the negligence of a husband is imputable to his wife does not apply here.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



McDONALD v. McDONALD.*

Civ. 9714.

District Court of Appeal, First District,
Division 1, California.

Feb. 27, 1935.

Hearing Granted by Supreme Court
April 27, 1935.

Marriage ⚭

Marriage contract entered into in Nevada between boy of 18 and girl of 16, who were residents of California and went to Nevada to evade California law and were married there without obtaining consent of their parents or guardians, and thereafter immediately returned to California, must be recognized as valid in California, notwithstanding California law making consent of parents or guardians indispensable, since marriage was valid under Nevada law (Civ. Code Cal. §§ 63, 62, subd. 1; § 83, subd. 1; Comp. Laws Nev. 1861-1900, §§ 482, 483, 499, 501).

Appeal from Superior Court, San Mateo County; Franklin M. Swart, Judge.

Action by Alecia McDonald against James McDonald III for separate maintenance in which defendant filed a cross-complaint for annulment of marriage between them. From a judgment dismissing the cross-complaint, defendant appeals.

Affirmed.

U. S. Webb and Hester W. Webb, both of San Francisco, for appellant.

C. Harold Caulfield and Edward D. Keil, both of San Francisco, for respondent.

PER CURIAM.

The plaintiff brought this action against the defendant for separate maintenance. Defendant answered, and also filed a cross-complaint in which he alleged that both plaintiff

and defendant being minors and residents of this state, and desirous of marrying each other, but unable to obtain the consent of their respective parents thereto, and with the intent of evading the law of this state requiring such consent, and with no intention of changing their domicile, went to the state of Nevada and there married, returning immediately thereafter. The prayer of the cross-complaint is for the annulment of such marriage.

The plaintiff interposed a general demurrer to this cross-complaint, which the trial court sustained without leave to amend. Judgment was thereupon entered dismissing the cross-complaint, and this appeal is taken from the judgment.

The question presented for determination by the appeal therefore is the validity of a marriage contract entered into in the state of Nevada between a young man of the age of eighteen years and a young woman of the age of sixteen years, both being residents of California, who, with no intention of changing their domicile and for the purpose of evading some requirement of the law of this state, went to Nevada and there married without the consent of their respective parents or guardians, immediately thereafter returning and resuming their residence here.

The action of the trial court in sustaining the demurrer to the cross-complaint was based upon section 63 of the Civil Code of this state which in terms provides that "all marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state," the court adopting the view that this marriage is valid in Nevada and, therefore, valid here.

The appellant urges various contentions in support of the appeal, among them being: (1) That the trial court misconstrued the law of Nevada; (2) that even if valid there, still this marriage, having been entered into without the consent of parent or guardian required by the law of this state, it is not saved by section 63 for the reason that that section is but the enactment of a rule of comity therefore followed by our courts, and that that rule did not and does not require the recognition here of a marriage repugnant to the policy of this state by reason of having been contracted without the required consent; and (3) that said rule of comity will not be followed, with consequent inapplicability of said section, for the reason that the parties to the marriage left the state of their domicile and

⚭For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 58 P.2d 163.

went to the foreign state for the specific purpose of evading the domiciliary law.

This marriage would admittedly be subject to annulment if celebrated in California. Civ. Code, § 82, subd. 1. We must, therefore, look to the law of Nevada to see if it is free from attack there.

The law of Nevada relating to this subject is found in "An Act relating to marriage and divorce," approved Nov. 28, 1861 (Compiled Laws of Nevada 1861-1900, §§ 482, 483, 499, 501), pp. 112, 115, from which we quote the following pertinent provisions:

"Section 1. That marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting, is essential.

"Section 2. Male persons of the age of eighteen years, and female persons of the age of sixteen years * * * may be joined in marriage; provided, always, that male persons under the age of twenty-one years, and female persons under the age of eighteen years, shall first obtain the consent of their fathers, respectively, or in case of the death or incapacity of their fathers, then of their mothers or guardians. * * *

"Section 19. When either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto * * * the marriage shall be void from the time its nullity shall be declared by a court of competent authority. * * *

"Section 21. When a marriage is supposed to be void, or the validity thereof is disputed, for any of the causes mentioned in the two preceding sections, either party may file a complaint in the probate court * * * for annulling the same; and such complaint shall be filed, and proceedings shall be had thereon, as in the case of proceedings in said court for a divorce, and upon due proof of the nullity of the marriage, it shall be adjudged null and void."

The next section of the act (section 502) prescribes the proceedings to be taken for divorce and the grounds upon which it will be granted.

It will be observed that section 19 above set out, unlike section 82, subd. 1, of the Civil Code of this state, does not make lack of consent of parent or guardian to the marriage of a minor a ground for its annulment. "Where a foreign statute has been construed by the courts of the state or country where enacted such construction will be followed by the courts of other states." 59 Cor. Jur. Stats. § 565, p. 946; *Osborne v. Home Life Ins. Co.*,

123 Cal. 610, 56 P. 616; *McManus v. Red Salmon Canning Co.*, 37 Cal. App. 133, 173 P. 1112. These statutory provisions of Nevada were construed by the Supreme Court of that state in the case of *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63. In that case the plaintiff, a minor but over the age of sixteen years, brought suit to annul her marriage to the defendant. (The suit is designated in the court's opinion as one for divorce, which seems to be quite justified by the language of the statute, section 21 above, but it is quite clear that it was one for annulment and was not sought upon any ground upon which in Nevada a divorce can be granted.) The facts showed that the plaintiff freely consented to the marriage but failed to obtain the consent of her mother, who was her guardian. A reference for the purpose of finding the facts and making conclusions of law being ordered, the referee found the facts mentioned and, as a conclusion of law, that the plaintiff was entitled to a decree of divorce; evidently being of opinion that the lack of parental consent went to the capacity of the minor to contract. The trial court, however, disagreed with this conclusion and ordered judgment for the defendant. An appeal being taken, the Supreme Court affirmed the judgment. In doing so that court construed section 2 of the act of November 28, 1861, above quoted, as changing the common-law ages of consent to sixteen for the female and eighteen for the male, and then in its opinion proceeded:

"Now, it remains to be seen what is the effect of the first proviso, and how a marriage between persons of lawful age is affected, if at all, by reason of non-consent of parent or guardian. In deciding this question, the hardship of a particular case can properly have no effect. What the authorities have declared the law to be, must be the rule of decision.

"By the common law and the statute law of this State (Stats. 1861, 94), marriage is held to be a civil contract. To render the contract valid, the parties must be able and willing to contract. At common law the age of capacity to make the contract of marriage was fixed at fourteen years for males and twelve years for females, upon the supposition, all things considered, that such provision was for the best interests of society; and by so fixing the age of capacity to contract, the inference naturally follows, 'that the parties at that age have sufficient discretion for such a contract, and they can then bind themselves irrevocably, and cannot be permitted to plead ever their egregious indiscretion, however dis-

trussing the result of it may be. Marriage before such age is voidable at the election of either party, on arriving at the age of consent, if either of the parties be under that age when the contract is made.' (2 Kent, 44.)

"The statute of this State does not alter the common law, save by substituting the ages therein named for the common law ages; and it has been generally, if not universally held, in construing similar statutes, that in the absence of any provision declaring marriage made in violation of the statutory proviso void, it was a valid and binding contract, upon the theory that persons of the consenting or lawful age, voluntarily entering into a contract, should be held thereto precisely as they would be held to any other lawful contract voluntarily assumed at the legal age, or upon majority. In other words, that the age fixed by statute as the age of consent, renders parties of such age no longer infants with regard to that special contract" (Citing cases.)

The same court in a later case (*State v. Zichfeld*, 23 Nev. 304, 46 P. 802, 805, 34 L. R. A. 784, 62 Am. St. Rep. 800), in considering the question of the validity of a common-law marriage in Nevada in the light of its statute requiring marriages to be solemnized, referred to the decision of *Fitzpatrick v. Fitzpatrick*, supra, with approval, and said: "It will be observed that the court held, in effect, that in the absence of any provision of the statute declaring the marriage of a minor, without the consent of parent or guardian, void, the marriage was valid, notwithstanding the explicit requirements of the statute that such consent shall first be obtained."

We can readily agree that a different construction of the Nevada statute would have been logical and reasonable; but that is no sufficient reason for this court under the principle of comity to disregard the construction by the Supreme Court of Nevada of its own statute.

It is suggested by the appellant that the case of *Fitzpatrick v. Fitzpatrick*, supra, did not decide the question of a minor's right to annulment of a marriage by reason of its having been contracted without the consent of parent or guardian, but that it was a suit for divorce, and that such lack of consent is not a ground for divorce. We have no difficulty, however, in reaching a contrary conclusion in view of the facts that the statutory grounds for annulment are contained in a section of an act entitled "An Act relating to marriage and divorce"; that the same act directs that the proceedings in a suit for annulment shall be as in a proceeding for divorce; that the

court in *Fitzpatrick v. Fitzpatrick*, supra, while characterizing it as an action for divorce, did not decide it upon the ground that the lack of parental consent was not one of the grounds of divorce specified in the statute but treated it as in fact a suit for annulment; and that it later in the case of *State v. Zichfeld*, supra, referred to it in terms as a suit for annulment.

It is also contended by the appellant that the case of *Fitzpatrick v. Fitzpatrick*, supra, cannot be given application to the case at bar, for the reason that our Civil Code classifies marriages into three kinds, viz., valid, void, and voidable, and that section 63 covers valid marriages only, whilst the marriage under consideration is of the voidable sort. A sufficient answer to this contention, we think, is that a voidable marriage is valid until avoided in the manner provided by law (*Fensterwald v. Burk*, 129 Md. 131, 98 A. 358, 3 A. L. R. 1562), and also that, as we have seen under the authority of the case cited, the marriage here in question would in Nevada be recognized as valid.

In the same connection it is urged by appellant that the precise facts involved in the case at bar were not present in the case cited, so that that case cannot be regarded as establishing a rule to be followed here. The difference in the facts, it is pointed out, is that in that case the element of a citizen leaving his domicile and going into a foreign state for the purpose of evading the law of the former, was not present.

We think this contention overlooks the fact that our examination of the law of the foreign state is not to be confined to what is expressed in one decision only, but extends to its statutes and to the entire body of the decisions of its highest courts. There is in Nevada, no more than in California, any statutory requirement that persons contracting marriage therein shall be legally domiciled in the state, or as to the existence of any specific intent in seeking the hospitality of the state, in the absence of which we know of no principle of law which would authorize its officials or its courts to inquire concerning it; nor in fact has appellant called our attention to any decision in which they have done so.

We come now to the second contention of appellant, viz., that the marriage here involved, even if valid in Nevada, is repugnant to the policy of this state because contracted without the consent of parent or guardian, which circumstance, it is said, would absolve this court from the obligation of the rule of comity referred to or its statutory enactment

In section 63, so that the validity of said marriage should be determined by our law, under which it admittedly is voidable at the suit of a minor party or his guardian. Civ. Code, § 83, subd. 1. The argument of appellant is that section 63 will not be applied to a marriage which is repugnant to the public policy of the state, and that the consent of parent or guardian not having been obtained, an essential prerequisite to the marriage of minors under our law, it is therefore repugnant to such policy.

Under this principle, foreign marriages which under our law would be regarded as incestuous or bigamous have been generally considered as not protected by the rule of comity or the section of our Code referred to; and it has been sometimes said that the law of a state indicates or establishes its public policy. We doubt very much whether it can be fairly said with reference to such a broad subject as matrimony that any single one of a number of statutory regulations governing it establishes the public policy of a state with regard to that subject. Such policy, we think, must be deduced from such regulations as a whole. It would be difficult to maintain that the requirement of parental consent is of such fundamental importance in our marriage requirements as to overcome the long, and perhaps universally, established rule that a marriage valid in the state where contracted will be accepted as valid elsewhere; and especially if, as here, its validity may only be called into question by the minor or his guardian, and only by them under the conditions prescribed in section 83, subd. 1, of our Civil Code. If the argument of appellant in this respect were sound, it would in fact leave no field of operation for section 63, for that section necessarily presupposes the existence in the foreign marriage of an element which would render its validity questionable in this state.

The question has been resolved in principle by our Supreme Court in *Estate of Wood*, 137 Cal. 129, 69 P. 900, 901. The marriage there considered, if it had been contracted in this state, would have been illegal and void; but the court, applying directly to it this section, held that, inasmuch as it was valid in the state of Nevada where contracted, it was free from attack here. We quote from the main opinion in that case: "At the outset it may be said that the policy of the law of the civilized world is to sustain the validity of marriage contracts. * * * Section 61, being general legislation prohibiting marriages between certain persons, has no extraterritorial

operation. An exhaustive review of this question is found in *State v. Shattuck*, 69 Vt. 403, 38 A. 81, 40 L. R. A. 428, 60 Am. St. Rep. 936. It is there said: 'The language of our statute is general, and it is a fundamental rule that no statute, whether relating to marriage or otherwise, if in the ordinary general form of words, will be given effect outside of the state or country enacting it. * * * Hence, if a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state, just as though the statute did not exist. Bishop on Marriage and Divorce (section 867) declares the same rule. Therefore, when section 61 uses the language, 'a subsequent marriage contracted by any person,' etc., it only refers to a subsequent marriage contracted in the state of California by any person, and the section should be read as though the words 'in the state of California' followed the word 'contracted.' It cannot be possible that the legislature by this section attempted to declare what particular marriages contracted in the state of Nevada, or any other place in the whole world, would be invalid and void. Section 63 of the Civil Code, hereafter quoted, shows that the legislature never thought of such legislation. By inserting the words 'in the state of California' in the section,—words which it is perfectly apparent should be inserted by construction,—then there is nothing left in this case for respondent; for the marriage here contracted and which we have here under consideration was not contracted in the state of California, but in the state of Nevada, and therefore section 61 has no application to it whatsoever. Section 61 refers to marriages contracted in this state, exactly as does section 60, which declares, 'All marriages of white persons with negroes or mulattoes are illegal and void.' In the face of that law, this court held that a marriage between a white man and a negro woman, contracted in the territory of Utah, being valid there, was a valid marriage in this state. *Pearson v. Pearson*, 51 Cal. 120. And this decision was based upon the broad proposition of law formulated in section 63 of the Civil Code, which declares: 'All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state.'"

In a concurring opinion in the same case, Chief Justice Beatty expressed his views on the subject thus: "If the Reno marriage was lawful in Nevada, it is valid here (Civ. Code, § 63)."

Our Supreme Court reached the conclusion stated, although, as is seen from the dissenting opinion in that case by Mr. Justice Harrison (page 146 of 137 Cal., 69 P. 900, 907), the findings of the lower court showed (a consideration pertinent to the next contention of appellant to be considered) that at the time of the marriage in question the parties thereto were domiciled in this state, and that "the plaintiff and the said Wood, for the sole purpose of marrying each other, and without any intent to change their residence, went to Reno, in the state of Nevada, and there married each other, and at once returned to their said residence in California, and continued to reside there," etc.

It is also to be noted that the marriage considered in the case last cited would in this state have been absolutely void; in the case at bar it is merely voidable; so that, if anything, there is even greater propriety in applying to this case the principle there approved and followed.

Coming now to appellant's third contention, viz., that this court will not regard the marriage here involved as protected by section 63 for the reason that the parties to it resorted to the foreign state for the express purpose of evading our law, and intended to return immediately after entering into the marriage.

The decisions of various jurisdictions on this question are conflicting, some holding that if such motive be present the courts of the domicile will refuse to recognize the marriage, whilst in others it will not have this effect. In a number of the states the question has been set at rest by the enactment of a statute declaring that such marriages shall not be judged by the standard of the foreign law, but by that of the domicile. In this state we have no such statute. There arises, perhaps, in the normal mind a first impulse to condemn such marriages because of the disregard or defiance of the domiciliary law involved. On the other hand, once the marriage has taken place, a new situation is created to which a different order of considerations applies and which should rather be regarded objectively than under the influence of a feeling of disapproval aroused by a deliberate evasion of a salutary law. In the case at bar, the parties, following their marriage, established a home, and a child has been born to them. The right given by sec-

tion 82 of the Civil Code to a minor, already referred to, is usually one to be exercised by him or her against a person of maturer years, which circumstance undoubtedly must have influenced the Legislature in conferring the right. Occasionally it happens, as in this case, that both parties to the marriage are minors; and we have here the man, the elder of the two, attempting to exercise it against the younger. It is a situation in which, although by the general terms of said section the right exists unless excepted by the application of section 63, it has not the same ethical basis as in the ordinary case of marriage of a minor to one who has attained majority.

Inquiring first as to what has been held on this question in other jurisdictions, it is said in 38 Corpus Juris, Marriage, § 3, p. 1278, that: "The fact that the parties to the marriage left their domicile for the purpose of evading its laws does not alter the general rule (that the validity of a marriage is to be determined by the law of the place where contracted), unless a statute expressly provides to the contrary."

As already stated, we have in California no such statute; but this element of evasion was present in *Estate of Wood*, supra, in which, as we have seen, the marriage, although void under our law, was held to be saved by the application of section 63. It is true that this element in the case was not specifically considered, but it was nevertheless glaringly apparent. But in the case of *Norman v. Norman*, 121 Cal. 620, 54 P. 143, 144, 42 L. R. A. 343, 66 Am. St. Rep. 74, this question was directly considered, and it was there held that such evasion did not invalidate the marriage. The court said: "It seems to be well settled that the motive in the minds of the parties will not change the operation of the rule. Chief Justice Gray, in *Commonwealth v. Lane*, 113 Mass. 458 [18 Am. Rep. 509], said: 'A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere * * * even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the state shall have no validity here.' This has been repeatedly affirmed by well-considered decisions. The authorities are found fully reviewed in that case, as they also will be found in support of the general rule in *Milliken v. Pratt*, 125 Mass. 374 [28 Am. Rep. 241], by the same learned jurist. See, also, as to marriages in evasion of the law of the domicile

of the parties, Bish. Mar. and Div. § 880 et seq. If the marriage in question can find support by the laws of any country having jurisdiction of the parties at the place where the marriage ceremony was performed, we should feel constrained by our code rule and well-considered decisions to declare it valid here, even though the parties were here domiciled at the time, and went to the place where they attempted to be married for the purpose of evading our laws, which they believed forbade the banns."

We hold, therefore, that this third contention of appellant has not been established, and accordingly that the ruling of the trial court on the general demurrer to the complaint was correct.

It follows that the judgment should be affirmed, and it is so ordered.



5 Cal.App.2d 211

LLOYD v. LOCKE-PADDON LAND CO.

et al.

Civ. 9490.

District Court of Appeal, First District,
Division 2, California.

March 11, 1935.

1. Vendor and purchaser ⇨8

Party contracting to sell realty need not have title thereto at time of making contract, but is only required to be able to convey title to purchaser at time fixed by contract.

2. Vendor and purchaser ⇨186

Vendor's mere permission of mortgage foreclosure sale of land contracted to be sold held not breach of contract relieving purchaser from obligation to continue contract payments during redemption period.

3. Vendor and purchaser ⇨341(2)

To show vendor's default before that of purchaser and recover purchase-money installments paid under contract for sale of realty, purchaser must allege and prove tender of balance due or excuse for failure to make tender.

4. Vendor and purchaser ⇨341(5)

One obtaining title to land, which he had agreed to purchase, from bank, which foreclosed mortgage thereon, on payment of agreed amount for release of mortgage, held

entitled to recover from vendor only difference between such amount and contract price.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Richard Lloyd against the Locke-Paddon Land Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

J. L. Smith, of San Francisco, for appellants.

Clark, Nichols & Eltse, of Berkeley, for respondent.

SPENCE, Justice.

Plaintiff brought this action against defendants Locke-Paddon Land Company, a corporation, Great Western Syndicate, a corporation, and William Locke-Paddon seeking to recover certain installments paid by plaintiff upon a contract to purchase real property together with interest thereon. The cause was tried by the court sitting without a jury, and, from a judgment entered in favor of plaintiff and against said defendants for approximately \$4,700, said defendants appeal.

On July 1, 1920, plaintiff entered into a written contract with defendant Locke-Paddon Land Company for the purchase of lot 12 of the Locke-Paddon subdivision of Watsonville Farms. At that time, title to the entire tract stood in the name of defendant Great Western Syndicate. Shortly before the execution of said contract, title to said tract had stood in the name of defendant William Locke-Paddon and Una Locke-Paddon, his wife, and they had executed a mortgage thereon in favor of People's Savings Bank to secure a promissory note in the sum of \$5,500. Said contract contained many of the provisions ordinarily found in contracts for the purchase of real property. It provided for the purchase of said lot 12 for the sum of \$2,750, of which \$600 was to be paid in cash and the balance of the principal was to be paid in monthly installments of \$20 per month. Interest on the unpaid balance was to be paid quarterly. The seller agreed to convey the premises to the purchaser free and clear of encumbrance "upon receiving the full purchase price" in the manner therein set forth. The purchaser was given the right to make payment in full at any time and secure a deed. In case of default in payment, the seller could retake the premises and retain all sums paid on the contract. It

was further recited: "The due performance of the terms and conditions of this agreement by the purchaser being a condition precedent whereupon depends the performance of the agreements made herein by the seller—time being of the essence hereof."

The plaintiff went into possession and made the payments required until about January 1, 1928, at which time there was between \$400 and \$500 remaining unpaid upon said contract. No payments were made thereafter. On October 3, 1928, a "Notice of Cancellation" was sent to plaintiff. Said notice recited the default of plaintiff, gave notice of election to declare the entire balance due and payable, and stated that unless the balance was paid before November 1, 1928, all of plaintiff's rights would terminate and the agreement would be deemed canceled and void. Plaintiff replied on October 23, 1928, claiming that the seller had breached the contract of sale by permitting the foreclosure of the mortgage on the premises. The foreclosure action had been brought in 1926 and the decree of foreclosure had been entered in September, 1927. The bank had purchased the property at the foreclosure sale on November 21, 1927, and the certificate was issued on that date. It thus appears that plaintiff ceased making payments shortly after the foreclosure sale and many months before the period for redemption from said sale had expired.

Plaintiff's complaint was drawn upon the theory that the seller had breached the contract by permitting the property to be sold upon the foreclosure sale, and that plaintiff was thereby excused from making further payments after such foreclosure sale. It was not alleged that any tender of the balance of the purchase price or of any further payments had been made. The trial court adopted plaintiff's theory that the seller was first in default by reason of permitting the sale under foreclosure, and gave judgment for plaintiff without allegation or proof of any tender of the purchase price. It may also be stated that while plaintiff obtained title from the bank prior to the commencement of this action upon payment of the sum of \$875, which was the amount fixed in an agreement between the seller and the bank for obtaining a partial release of the mortgage as to said lot 12, plaintiff was nevertheless given judgment for the entire amount paid upon the contract together with interest thereon. In giving judgment against all of the defendants, the trial court sustained plaintiff's claim that the defendant corporations were but the alter ego of defendant

William Locke-Paddon, and that the contract was entered into on behalf of all of said defendants.

Several contentions are urged by appellants on this appeal, but, in view of the conclusions which we have reached, we deem it unnecessary to discuss all of them. The main question is whether appellants breached the contract of sale by permitting the property to be sold to the bank on the foreclosure sale. This question is of primary importance in determining who was first in default under said contract of sale and in determining whether it was necessary for respondent to allege and prove a tender of the purchase price in order to sustain an action against appellants.

[1, 2] The solution of this question involves a consideration of the obligations of the seller under the contract of sale. We believe that it is entirely clear that the seller was not required to have title to the property at the time of making the contract of sale, but was only required to be able to convey title to the purchaser at the time fixed by said contract for such conveyance. *Hanson v. Fox*, 155 Cal. 106, 99 P. 489, 20 L. R. A. (N. S.) 338, 132 Am. St. Rep. 72. Under the terms of said contract, the seller was not required to convey except "upon receiving the full purchase price" in installment payments with interest as therein provided, or, at the option of the purchaser, upon payment of the entire unpaid balance of the purchase price at any time prior to default by the purchaser. But here respondent ceased making his payments shortly after the foreclosure sale and at least ten months before the period for redemption had expired and never made a tender of the balance of the purchase price or any part thereof. This was a breach of the contract by respondent unless the mere permitting of the foreclosure sale constituted a prior breach on the part of appellants relieving respondent from this obligation to continue such payments. In our opinion, it did not. Our attention has not been called to any case where a purchaser, before the time for redemption had expired, claimed that the seller had breached his contract by permitting a foreclosure sale, but the reasoning of the authorities indicates that a mere showing that the seller permitted a foreclosure sale is insufficient to show a breach of the contract on the part of the seller. *Heden v. Point Reyes Land Co.*, 185 Cal. 121, 196 P. 44; *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 170, 159 P. 420; *Brimmer v. Salisbury*, 167 Cal. 522, 140 P. 30; *Hanson v. Fox*, supra;

Griesemer v. Hammond, 18 Cal. App. 535, 123 P. 818; **Joyce v. Shafer**, 97 Cal. 335, 32 P. 320. While none of the authorities cited involved a foreclosure sale, the obligations of the seller are very exhaustively discussed therein. The case of **Griesemer v. Hammond**, supra, involved a case where there was a deed of trust upon the property. It was there held that there was no unremovable defect in the title and that the purchaser could not recover the amount paid on the purchase price, without tendering the balance and demanding performance. See, also, note 40 A. L. R. 701. It was further held that: "The vendor had a right to rely on the purchase money to liquidate the indebtedness secured by the deed of trust." In the present case there was no unremovable defect in the title because of the foreclosure sale, and the seller had a right to rely upon the purchase money to redeem from said sale. In this connection it may be stated that while the indebtedness secured by the mortgage was less than \$5,000 at the time of the sale, the evidence showed that there was \$10,000 remaining unpaid on the outstanding contracts of sale.

Respondent cites and relies upon **Wilhelm v. Fimple**, 31 Iowa, 131, 7 Am. Rep. 117. We believe it sufficient to state that apparently the time for redemption had expired in that case. The general rule is recognized, however, where the court said at page 134 of 31 Iowa, "Where a vendor has done or suffered no act which renders him incapable of performing his contract, it seems to be in accord with the weight of authority, that the purchaser cannot rescind the contract and recover the purchase-money paid, without first tendering the unpaid purchase-money, and demanding performance on the part of the vendor." In the present case it was not alleged nor did it appear that the seller had done or suffered any act prior to the default of the purchaser which rendered the seller incapable of performing the contract. That it is the failure to redeem from the foreclosure sale rather than the mere permitting of a foreclosure sale which renders the seller incapable of performing and excuses performance by the purchaser is clearly indicated in **Kicks v. State Bank of Lisbon**, 12 N. D. 576, 98 N. W. 408, where the court said, at pages 409 and 410: "By allowing the foreclosure to ripen into a perfect title, the defendant violated its contract, and placed it beyond its power to comply with it. * * * The defendant abandoned the contract by not redeeming. * * * The failure of the defendant to redeem from the sale,

and the issuing of a deed upon the sale, justify the conclusion of its intention to abandon the contract, or its inability or unwillingness to abide by it." This view also finds support in cases involving sales for taxes. **Deakin v. Underwood**, 37 Minn. 98, 33 N. W. 318, 5 Am. St. Rep. 827; **Ley v. Huber**, 3 Watts (Pa.) 367. We therefore conclude that in order to show that the seller had abandoned the contract or rendered itself incapable of performing the same, thereby excusing the purchaser from making further payments, it was necessary for the purchaser to allege and prove more than that the seller had permitted the property to be sold on foreclosure. This the respondent failed to do, and there was therefore neither allegation nor proof that appellants were first in default under said contract of sale.

[3] We do not wish to be understood as holding that a purchaser must in all cases continue to make his payments throughout the period of redemption where the seller has permitted the property to be sold under foreclosure. Such a rule would no doubt work a hardship in cases where the seller, due to insolvency or other cause, is wholly incapable of performing the contract even upon a tender by the purchaser. But to show that the seller was first in default and to recover the installments paid on the purchase price, the purchaser must either allege and prove a tender or an excuse for his failure to make a tender (**Townsend v. Tufts**, 95 Cal. 257, 30 P. 528, 29 Am. St. Rep. 107), and in our opinion the mere allegation and proof of a foreclosure sale is insufficient for this purpose. The judgment herein must therefore be reversed.

[4] Upon a retrial of the cause, it may be possible for respondent to allege and prove facts showing that the seller was first in default. It is therefore necessary to discuss appellant's contention regarding the extent of respondent's recovery herein. As above stated, respondent obtained title from the bank prior to the commencement of this action upon payment of the sum of \$875. Under the contract, respondent would have been required to pay the unpaid installments amounting to between \$400 and \$500. Appellants contend that, even assuming they were first in default, respondent's recovery should have been limited to the difference between the amount which respondent was compelled to pay to the bank to obtain title and the amount which respondent would have been required to pay under the contract of sale. In our opinion, this contention must be sus-

tained. The rule is stated in 66 Corpus Juris, page 1577, as follows: "Where the purchaser has obtained title from a third person, damages for the vendor's failure to convey have been measured by the amount in excess of the purchase price which the purchaser has been compelled to pay for the property, or, as otherwise stated, the purchaser is entitled to recover the additional amount which he is obliged to pay to such third person less the amount unpaid on the purchase price." See, also, *Wright v. Avenson*, 174 Minn. 97, 218 N. W. 453; 25 Cal. Jur. 689. In justice to appellants it may be stated that the evidence shows that they offered to pay respondent the difference between said amounts, but respondent refused to accept said offer.

The judgment is reversed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**



5 Cal.App.2d 294

**SILVA v. CO-OPERATIVE DAIRY-
MEN'S LEAGUE.**
Civ. 9776.

District Court of Appeal, First District,
Division 2, California.
March 18, 1935.

Rehearing Denied April 17, 1935.
Hearing Denied by Supreme Court
May 16, 1935.

1. Courts ⇨85(1)

Court rule relating to dismissal of appeal if transcript of record and appellant's points and authorities are not filed within time prescribed has force of positive law so far as rights of parties are concerned (Rule V of the Supreme Court and District Court of Appeal).

2. Appeal and error ⇨627(2)

Right to have appeal dismissed for failure of appellant to file transcript within time limited by rule must be determined by facts as they exist at time notice of motion is given, and is not destroyed by subsequent filing of a purported transcript (Rules I, V, § 1, of the Supreme Court and District Court of Appeal).

3. Appeal and error ⇨800

Where, at time notice to dismiss appeal was given, no transcript was filed, appellee held entitled to dismissal of appeal, notwithstanding appellant filed transcript prior to hearing on motion, since right to dismissal

of appeal was determined by facts as they existed at time notice of motion was made (Rules I, V, § 1, of the Supreme Court and District Court of Appeal).

4. Appeal and error ⇨628(1)

Appellant, to avoid dismissal for failure to file transcript in time, must by affidavit show some sufficient excuse calling for relaxation of court rule requiring such filing (Rules I, V, § 1, of Supreme Court and District Court of Appeal).

Appeal from Superior Court, Alameda County.

Action by Manuel Silva against the Co-operative Dairymen's League. Judgment for defendant, and plaintiff appeals. On motion to dismiss appeal.

Motion granted.

Carleton L. Rank and Milton Newmark, both of San Francisco, for appellant.

Decoto & St. Sure, of Oakland, for respondent.

STURTEVANT, Justice.

Heretofore the plaintiff commenced two different actions in which he sought to recover judgments for money had and received. Thereafter, for the purpose of trial, the two actions were consolidated. Still later the actions came on for hearing, and on December 13, 1933, the trial court caused to be entered a judgment in favor of the defendant. On December 15, 1933, the plaintiff filed a notice of appeal. On November 13, 1934, an order was made by the trial court terminating proceedings therein. On January 22, 1935, the defendant served and filed a notice of motion to dismiss the appeal. In that notice it stated its motion would be " * * * made upon the ground that neither a bill of exceptions nor the transcript of the record in said actions has been filed within the time allowed by law and rules of the District Court of Appeal and upon the further grounds that said proceedings on appeal and/or to obtain a transcript on appeal in this action have been terminated by the Superior Court from which said actions are appealed." In said notice of motion the defendant stated that its motion would be made upon all the records and files in said action and such certificates as it would produce at the hearing. At the same time it served and filed a certified copy of the order terminating proceedings in the trial court, a certified copy of an order denying a motion

made under section 473, Code of Civil Procedure, to be relieved from the order terminating proceedings, and it also filed a certificate of the county clerk showing in chronological order the different proceedings had and taken in the trial court, and which certificate also showed that on the 22d day of January, 1935, there were no proceedings for a bill of exceptions or for a transcript under section 953a pending in the trial court. On February 9, 1935, the plaintiff filed in this court a transcript which on its face purports to be a transcript supporting an appeal from the judgment based on the judgment roll and an uncertified and unauthenticated transcript of the reporter under section 953a, Code of Civil Procedure. The hearing of this motion was had on February 11, 1935. In reply to the showing made by the defendant, the plaintiff presented no evidence. However, he contended the filing of the transcript prior to the hearing on the motion to dismiss will defeat the motion. He cites in support of that contention a number of authorities. Some of those authorities were based on a hearing where the motion to dismiss was resisted on a showing that the adverse party was entitled to be relieved of its apparent default by applying for relief under section 473, Code of Civil Procedure. *Snodgrass v. Hand*, 125 Cal. App. 265, 13 P.(2d) 769. Other cases rested on a defective transcript as distinguished from no transcript having been filed. *Woodside v. Hewel*, 107 Cal. 141, 40 P. 103; *Warren v. Hopkins*, 110 Cal. 506, 42 P. 986; *In re Ryer's Estate*, 110 Cal. 556, 42 P. 1082.

[1-4] The instant case does not fall in any one of said classes. As recited above, the defendant made its motion to dismiss on January 22, 1935. That was sixty-four days after the order terminating proceedings in the trial court. The plaintiff was then decidedly in default. Rule I of the Supreme Court and District Courts of Appeal of California. At the time the notice to dismiss was given no transcript of any kind or nature was on file. The defendant was therefore entitled to make its motion. Section 1, rule V. It provides as follows: "If the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed, upon notice given, either on motion of the respondent or of the court in which the appeal is pending. If the transcript, or

the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion." (Italics ours.) That rule has the force of positive law so far as the rights of the parties are concerned. *Brooks v. Union Trust, etc., Co.*, 146 Cal. 134, 79 P. 843; *Helbush v. Helbush*, 209 Cal. 758, 763, 290 P. 18.

The rights of the defendant to have the appeal dismissed for the failure of the plaintiff to file his transcript within the time limited by the rules must be determined by the facts as they exist at the time the notice of motion is given and is not destroyed by the subsequent filing of a purported transcript. *Shain v. People's Lumber Co.*, 98 Cal. 120, 32 P. 878; *McCabe v. Healey*, 139 Cal. 30, 72 P. 359; *Barnhart v. Conley*, 17 Cal. App. 230, 119 P. 200; *Raisch Improvement Co. v. Arata*, 193 Cal. 573, 226 P. 399. The rule applicable is stated in 2 California Jurisprudence, 773, as follows: "Rule V of the Supreme Court, after providing that a failure to file the transcript of the record or appellant's points and authorities within the time limited is ground for dismissal, provides further that if the transcript, or points and authorities, though not filed within the time prescribed, be on file at the time notice of motion to dismiss is given, that fact shall be sufficient answer to the motion. Under this rule the right of a respondent to a dismissal is determined by the facts as they exist at the time the notice of motion is given. If there is a transcript or brief on file at that time, this fact of itself prevents a dismissal of the appeal under rule V. If no transcript or brief is on file at the time the notice is given, and no extension of time is applied for or granted, the right of the respondent to a dismissal is not defeated by the mere filing of a transcript or brief subsequently thereto. To avoid a dismissal in such case, the appellant must by affidavit show some sufficient excuse calling for a relaxation of the rule." An examination of the decided cases discloses that the text is supported by the decisions of the Supreme Court if not in all instances by the decisions of the other courts in this state. See *Smith v. Taecker*, 127 Cal. App. 78, 15 P.(2d) 193, and cases cited.

The motion is granted.

We concur: NOURSE, P. J.; SPENCE, J.

CAMBRA v. JUSTICE'S COURT OF SANTA ANA TP. et al.*

Civ. 1392.

District Court of Appeal, Fourth District,
California.

March 6, 1935.

Hearing Granted by Supreme Court
May 3, 1935.

Justices of the peace ⇨ 43(2)

In view of repeal of statute which restricted territorial jurisdiction of class A justice's court to its township lines, action to recover \$584 damages sustained in automobile collision in township having only class B justice's court *held* within exclusive jurisdiction of the only class A justice's court in county (Code Civ. Proc. §§ 65, 81, 82, 112, 395, as amended by St. 1933, pp. 1808, 2476, 1810, 1814, 1840; Const. art. 6, §§ 5, 11a).

Original proceeding by Gloria Cambra against the Justice's Court of Santa Ana Township, Orange County, and Kenneth E. Morrison, Justice of the Peace of said court.

Peremptory writ of mandate granted.

Forgy, Reinhaus & Forgy, of Santa Ana, for petitioner.

Head, Wellington & Jacobs and H. C. Cameron, all of Santa Ana, for respondents.

MARKS, Justice.

This is an original proceeding instituted in this court to compel respondents to file a complaint in a civil action. The facts are not in dispute.

On September 29, 1934, petitioner was injured in an automobile accident which occurred in an intersection of county roads in Huntington Beach township in Orange county. There is a class B justice's court in that township. The respondent court is the only class A justice's court in Orange county. Kenneth E. Morrison is its justice of the peace. Petitioner prepared her complaint against T. C. McNulty and C. E. Phillips, whereby she sought to recover damages in the sum of \$584. It was presented to the clerk of the respondent court for filing, together with the required filing fee. The clerk refused to file the complaint on the ground that the superior court of Orange county had exclusive jurisdiction of the action. This action was upheld by the respondent justice of the peace. The sole question to be decided is whether the superior court of Orange county or the class A justice's court of Santa Ana township has original jurisdiction of the ac-

tion. The case is of first impression, as the precise question has not been decided by the Supreme or any of the appellate courts of the state since the Legislature of 1933 recast the sections of the Code of Civil Procedure fixing the jurisdiction of class A justices' courts. For this reason we have little to guide us except the appropriate sections of that Code and the sections of the Constitution bearing upon the question.

The emphasis hereafter placed upon the quotations from Code sections is our own. All quotations from Code sections are taken from the Code of Civil Procedure.

Section 65 (as amended by St. 1933, p. 1808) provides as follows: "The organization and jurisdiction of the superior courts are provided for in the Constitution of this State."

In section 81 (as amended by St. 1933, p. 2476) we find the following: "Justices' courts in cities, towns and judicial townships, having a population of 30,000 or more, shall be known, and may be designated, as 'Justices' courts of Class A.'"

Section 82 (as amended by St. 1933, p. 1810) provides: "The establishment of a municipal court, or justices' court of Class A, in a county, or city and county, or the determination of the jurisdiction of such courts by the Legislature, shall not affect, alter or diminish the previously existing jurisdiction of the superior court of any county, or city and county, *other than that of the county, or city and county, wherein such municipal or justices' court is established.*"

Section 112 (as amended by St. 1933, p. 1814) contains the following: "Justices' courts of Class A shall have original jurisdiction: (a) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars or less, except cases at law which involve the title or possession of real estate or the legality of any tax, impost, assessment, toll or municipal fine. * * *

Section 395 (as amended by St. 1933, p. 1840) provides in part as follows: "* * * If the action be for injury to person, or to personal property, or for death from wrongful act, or negligence, either the county where the injury occurs, or where the injury causing death occurs, or the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action. * * * If there is a municipal or justices' court, having jurisdiction of the subject matter of the action, established in the city, city and coun-

⇨ For other cases see same topic and KEY NUMBER in all Key Number Digests and indexes

*For subsequent opinion see 49 P.2d 1121.

ty, town or judicial township, in which the defendant, or any defendant, so resides, or in which the injury to person or to personal property, or the injury causing death, occurs, or, in the cases hereinabove mentioned, in which the obligation was contracted to be performed, such court is a proper court for the trial of such action; *otherwise any court in such county, having jurisdiction of the subject matter of the action, is a proper court for the trial thereof.*"

It should be observed that the Legislature repealed section 106 of the Code of Civil Procedure which limited the territorial jurisdiction of justices' courts to the boundaries of their respective townships. St. 1933, c. 743, p. 1835, § 61. It also repealed section 832 of the same Code which provided where actions in justices' courts should be commenced. St. 1933, c. 744, p. 1904, § 198.

Section 5 of article 6 of the Constitution provides in part as follows: "The superior court shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices or other inferior courts). * * *

Section 11a of article 6 of the Constitution provides: "The legislature shall determine, according to population, the number and jurisdiction of each of the inferior courts in incorporated cities or towns wherein there is no municipal court, and in townships, counties or cities and counties, and the number of judges or justices thereof and their qualifications and compensation, and shall fix by law the powers, duties and responsibilities of each of such courts and of the judges or justices thereof; and may provide that the jurisdiction of such courts shall be exclusive."

The last clause of section 395 of the Code of Civil Procedure, which we have italicized, might easily have clearly expressed the intention of the Legislature had different language been used. The ambiguity arises from the fact that class B justices' courts have original jurisdiction in an ordinary action for money where the demand, exclusive of interest, does not exceed \$300, and the further fact that prior to the amendments of 1933 it was held that the superior court had jurisdiction in an action for money where the demand was over \$300 if the cause of action arose and the defendant resided in the county but outside a township having a class A justices' court (*Van Horn v. Justice's Court*, 216 Cal. 235, 13 P.(2d)

704, 707), and the still further fact that a class A justice's court was formerly given jurisdiction of ordinary actions for money where the demand was for not more than \$1,000, and when the cause of action arose or the defendant resided within the township, and again the still further fact of the above-mentioned uncertainty of the language in the last clause of section 395 of the Code of Civil Procedure as amended in 1933.

The question here arises, Did the Legislature by the last clause of section 395 of the Code of Civil Procedure intend to give the superior court or a class A justice's court in the county original jurisdiction of an action such as the one we have before us, or did it intend to give those courts concurrent original jurisdiction? The language of the clause, when considered by itself, would seem to make possible an affirmative answer to any of these propositions. However, we are assisted in solving the problem by other acts of the Legislature. In 1929 that body repealed section 113 of the Code of Civil Procedure. This section gave superior and justices' courts concurrent jurisdiction over certain cases. St. 1929, p. 834, § 2. As we have seen, the Legislature repealed section 106 of the same Code which limited the civil jurisdiction of justices' courts to the limits of their townships. One of the reasons for the creation of class A justices' courts was to take away some of the work of superior courts in order to relieve congestion there. There is evident a policy on the part of the Legislature to reduce the jurisdiction of the superior court by granting greater jurisdiction to the inferior court. *Van Horn v. Justice's Court*, supra. While the case just cited was decided under the law in effect before the amendments of 1933 became effective, the following language the Supreme Court there used should be applicable to the instant case: "There can be no such thing as concurrent jurisdiction over the same subject-matter of an action in the superior court and in the justice's court. * * * As is said in a previous part of this opinion, where the jurisdiction of the justice's court ends, the jurisdiction of the superior court begins. There is no overlapping of jurisdiction, and no option is given to a litigant to select one or the other of these two courts in which to institute his action."

As the venue of the action is laid in Orange county, and as the restriction on the territorial jurisdiction of the respondent court to its township lines has been removed by the repeal of section 106 of the Code of Civil Procedure, and as the policy of the law seems

to be against giving the superior court of Orange county and the respondent court concurrent jurisdiction over the action, and as the respondent court has territorial jurisdiction and jurisdiction over ordinary actions for money where the demand is for not more than \$1,000, we have concluded that the respondent court has exclusive original jurisdiction of the case of *Gloria Cambra v. T. C. McNulty and C. E. Phillips*.

It is ordered that the peremptory writ of mandate be issued directing the respondent court and justice of the peace to file the complaint, a copy of which is attached to the petition in this cause upon being paid a filing fee in the sum of \$5.

We concur: BARNARD, P. J.; JENNINGS, J.



5 Cal.App.2d 117

THOMPSON v. M. K. & T. OIL CO.

Civ. 8870.

District Court of Appeal, Second District,
Division 1, California.

March 5, 1935.

1. Appeal and error ⇨197(1)

Question of variance, unless raised by objection to testimony or motion for nonsuit, is waived and cannot be first raised on appeal.

2. Pleading ⇨398

Variance, to be material, must have prejudicially misled adversary (Code Civ. Proc. § 469).

3. Mines and minerals ⇨83

In action on alleged contract whereby corporation agreed to pay plaintiff \$10 a foot for drilling oil well and to furnish everything except labor and casing, corporation could not claim that contract was too indefinite, where corporation, after parties had acted thereon for 21 days, stopped drilling at 1,465 feet.

4. Appeal and error ⇨197(4)

Although one instruction authorized recovery on contract pleaded and another instruction on contract proved, instructions held not misleading, where question of variance was not raised at trial and issue was whether defendant had contracted to pay plaintiff

merely monthly salary or specified amount per foot for drilling oil well.

5. Appeal and error ⇨1068(1)

In action on alleged contract to pay plaintiff for drilling oil well, instruction, if constituting formula instruction, held erroneous to extent that it included item of damage not pleaded and omitted credit for sum admittedly paid; error being harmless, however, where plaintiff remitted such included item after judgment and where appellate court directed trial court to allow such credit.

6. Appeal and error ⇨1032(3)

Before appellant can successfully challenge misleading instruction, he must show that on proper instruction verdict might have been in his favor.

7. Corporations ⇨298(1)

Where all directors are present when contract is agreed on, corporation cannot deny contract merely because not made at legal meeting of directors.

8. Corporations ⇨298(7)

If contract to pay plaintiff for drilling oil well was made at directors' meeting, corporation could not avoid contract by failing to write up minutes of meeting, since one contracting with corporation need not ascertain that corporate minutes show transaction.

9. Trial ⇨295(1)

Instructions must be considered in entirety.

10. Appeal and error ⇨1002

Verdict on sharply conflicting evidence on which jury might have found for either party cannot be disturbed on appeal.

Appeal from Superior Court, Ventura County; Wm. D. Dehy, Judge.

Action by William P. Thompson against the M. K. & T. Oil Company. From a judgment for plaintiff, for whom John E. Thompson, his administrator, was substituted as plaintiff, defendant appeals.

Trial court directed to reduce the judgment, and, as so reduced, judgment affirmed.

Blackstock & Rogers and Merle J. Rogers, all of Ventura, for appellant.

James C. Hollingsworth and Don R. Holt, both of Ventura, for respondent.

EDMONDS, Justice pro tem.

William R. Thompson had judgment against the defendant upon the verdict of a jury. He subsequently died, and his administrator has

been substituted as plaintiff. The defendant's principal contention on appeal is that the evidence is insufficient to sustain the verdict. Error is also predicated upon instructions given and refused.

The case arose out of the drilling of an oil well on property near Ventura leased by the defendant. The lease required a well to be started before November 1, 1929. Prior to October 27, 1929, the defendant, whose business was the development and production of oil, had employed Thompson at a salary of \$300 per month to supervise the building of a road to the property and the installation of drilling machinery. During the progress of this work, Thompson was endeavoring to secure a contract with the defendant to drill the well. Negotiations had proceeded to the point of preparing a written contract which had been signed by Thompson and the company, but had not been delivered because Thompson could not procure the bond required by its terms.

This was the situation the latter part of October. The defendant's lease provided that it must spud in a well before November 1st. Nothing definite had been accomplished toward drilling other than to have the machinery on the ground. A few days before October 27th the secretary of the defendant corporation sent each director a telegram requesting him to come to the company's office at Ventura for a meeting on that day. Every director was present when the meeting or conference convened. Whether this was a legal meeting of the directors or a conference of individuals is a matter of dispute. However, there was considerable discussion of ways and means to drill the well; Thompson being present for a part of the time. The directors went over the situation with him at length, and this suit is upon an oral contract alleged to have been made at that time.

The testimony of Thompson and six of the seven directors of the company as to what occurred that day is in direct conflict. According to Thompson, he told them that he would drill the well for \$10 a foot, including labor and casing, the company to furnish everything else; that he had no capital, and that they must advance the money for labor and material, with \$4 per foot to be held back until the well was completed; that he was also to have a drawing account of \$300 per month, and to be paid a bonus of \$1,000 in the event that the contract was terminated before a depth of 4,000 feet had been reached. Thereupon Thompson testified the president said to him: "Well you go back on that

mountain and go to work and get that well started before the time expires, on the terms that you will get \$10 a foot for your contract and you are to pay the labor and the casing. We will furnish everything else." Thompson further testified that three of the other directors expressly assented to this, and that the president also said: "We want you to go up and start this well, and we are now going to authorize Judge Brady to draw this up in writing and have it signed." This was substantially corroborated by one of the then directors, although the others testified that this director was not present at the time Thompson conferred with them.

Each one of the other six directors positively denied that any contract other than that Thompson was to continue working for the company was agreed upon. They testified that Thompson was told to get the well spudded in and superintend the drilling of it, and several said it was expressly stated that he was to continue at the same salary of \$300 per month. All six stated that at the meeting every director had expressed the opinion that no drilling contract at a stated rate per foot would be entered into, unless a satisfactory bond was given.

No vote was taken by the directors, no minutes of the meeting were written up by the secretary, and no written contract embodying any agreement made on October 27th was prepared. Thompson immediately started work drilling the well, and continued for 21 days, at which time the defendant ordered drilling stopped. During this time Thompson hired and discharged men, ordered casing, and approved bills for material. The defendant paid these bills and also all of the pay rolls. Thompson did not pay out any money at any time, either for labor, casing, or any other expense connected with drilling operations on the lease. He estimated that the defendant corporation paid out \$4,425 during this time. Also, three days after drilling was stopped, Thompson was given a check for \$300 on which the following appears: "This check is issued in payment of items as per statement following. The endorsement of payee on back will constitute a receipt in full. For Labor in Full to Date Oct. 31." Thompson indorsed the check and received the money thereon, although he testified he said at the time it was given to him: "This does not apply to my contract; it is only for my drawing allowance."

Drilling was stopped at a depth of 1,465 feet, and the first cause of action is on the alleged contract for drilling the well at the

rate of \$10 per foot, less the \$300 paid. A second cause of action is under the common count for the same amount, as the reasonable value of the services alleged to have been rendered. The verdict of the jury was for \$10,834.50, \$1,000 of which was remitted by the plaintiff on motion for a new trial.

[1, 2] Appellant asserts that the evidence is insufficient to sustain the verdict, upon the ground that there is a variance between the terms of the contract alleged in the complaint and as testified to by plaintiff. No objection was made in the trial court to the admission of evidence upon this ground, nor was any motion for nonsuit presented. "It is well settled that if a defendant desires to take advantage of a variance, it must be done either by objecting to the admission of the testimony or by motion for a nonsuit, and when such action has not been taken in the trial court, the objection is deemed waived and cannot be raised for the first time on appeal." *Cousin v. Mason*, 78 Cal. App. 111, 113, 248 P. 299, 300. Also no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice. See Code Civ. Proc. § 469. No prejudice has been either claimed or shown.

[3] Defendant cannot claim that the contract is too indefinite and uncertain to constitute a contract. The parties acted upon it, and, so far as the record shows, no question arose during the entire drilling operations concerning the rights or duties of either. Thompson supervised the drilling, and the defendant paid the bills. It has not claimed that any expense was incorrectly incurred by Thompson or paid by it, nor that the well was not properly drilled.

[4] Appellant urges that two instructions given to the jury are conflicting and erroneous. It was instructed that plaintiff had the burden of proving "that the agreement pleaded in the complaint was entered into by plaintiff and defendant, by and with the consent of both parties; and * * * that plaintiff did each and every act in said agreement provided on his part to be done." The jury was also instructed that, "if you believe, by a preponderance of the evidence, that plaintiff and defendant entered into a contract whereby defendant agreed to pay plaintiff ten (\$10.00) dollars a foot for every foot of well drilled by plaintiff," with a bonus of \$1,000 if the contract was terminated at less than 4,000 feet, and that, if plaintiff substantially complied with his contract, and was prevented from completely fulfilling it by the defendant,

they should find for plaintiff. It is true that the first instruction refers to an agreement as pleaded in the complaint, and that the second authorized a verdict for the plaintiff if the jury found that a contract was entered into as shown by the evidence in the case. But, in view of the fact that no objection was made at the trial to the variance between the pleading and the evidence, and the case was tried on the assumed issue as to whether or not a contract to drill the well for \$10 a foot had been entered into between the parties, the jury could not have been misled. The defendant never admitted that it entered into a contract with Thompson for drilling the well on a footage basis. It at all times denied that he did any work for the corporation other than as an employee at a salary of \$300 per month. Under these circumstances, any such conflict in the instructions could not have prejudiced the defendant.

[5, 6] The defendant particularly criticizes what is termed a formula instruction, principally upon the ground that it does not contain all of the elements necessary for such a charge to a jury. The jury was told that, "if you believe from the testimony that a contract existed between the plaintiff and defendant, as contended by plaintiff, and that plaintiff was entitled to a bonus or additional sum in the amount of \$1,000 in event the same was terminated by defendant after plaintiff had drilled the hole in question to a depth of 1456 feet, and if you further believe that plaintiff performed all of the terms and conditions of said contract on his part to be performed and that there was expended by defendant under the terms of said contract, the sum of \$4,725.50, and that there was no accord and satisfaction between said parties, then in that event the said sum of \$4,725.50 should be deducted by you from the total contract price of \$10.00 per foot for the drilling of said 1456 feet of hole, together with said additional sum of \$1,000.00, and your verdict should then be in favor of the plaintiff for the difference between \$4,725.50 and \$15,560.00, to-wit, in the amount of \$10,834.40." It may be noted that the verdict was for the exact amount stated in this instruction.

Conceding this to be a formula instruction, it was erroneous to the extent that it included as an item of damage the sum of \$1,000, shown by plaintiff's evidence to have been part of the contract, but not pleaded in the complaint, and failed to mention the sum of \$300 which the plaintiff admitted having received on account. As \$1,000 was remitted by plaintiff after judgment, the defendant has

suffered no prejudice by mention of that item in the instruction; \$300 should have been allowed as a credit to the defendant, and the trial court will be directed to reduce the judgment by that amount. If the jury believed that any contract had been made as shown by the plaintiff's evidence, he was entitled to payment for 1456 feet of well at \$10 per foot less \$4,725.50 expended by the defendant and \$300 paid to the plaintiff. Before defendant can successfully challenge a misleading instruction, it must show the evidence to be such that upon a proper instruction there might have been a verdict in its favor. *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 776, 89 P. 1109. It has not done so here.

[7] The jury was instructed: "If you believe from the testimony in this case that a contract existed between the plaintiff and defendant as contended by plaintiff, then it becomes immaterial whether or not the meeting of the officers and directors, or any of them, on October 27, 1929, was a special meeting, regular meeting, ex-officio meeting or a so-called gathering." If a contract was in fact made, the kind of a meeting by which it was authorized is immaterial. If all of the directors of a corporation are present when the terms of a transaction are agreed to, the corporation cannot deny the contract upon the ground that it was not made at a legal meeting. In the case of *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 143, 77 P. 817, it was said: "A majority of the defendant's board of directors, including both Crosland, who was its secretary and treasurer, and the vice president, actively participated in employing plaintiff and counseling with him concerning the care and treatment of the patient. And all this was done avowedly on behalf of defendant. This was sufficient to charge the corporation. It was not necessary that the employment should be made or ratified by action of the board at a regular meeting. The separate assent of a majority of the board was all that ought to be required under the circumstances presented by the evidence." The same conclusion was reached in *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 387, 89 P. 86, 87, 91, where the court said: "The majority of the board having knowledge of the facts, it was not necessary to conclude the corporation in favor of plaintiff, that his employment should be ratified at a regular meeting of the board. It was sufficient that the majority of the board individually were advised of the terms of the employment of plaintiff by Mr. Doe, and took no measures to disaffirm as directors that employment."

[8] The jury was also instructed: "You are instructed that in determining whether or not a contract in fact existed between the plaintiff and defendant in this case that it is immaterial whether or not the minutes of the meeting of the board of directors at which said contract is alleged to have been entered into was reduced to writing and entered in the minute book of the corporation."

The contract, if made, could not have been avoided by the corporation by its failure to write up any minutes of the meeting at which it was agreed upon. One contracting with a corporation is not required to ascertain that the corporate minutes show the transaction. "If a corporation allows its officers to conduct its business and third persons act upon the apparent authority thus shown, it cannot defeat the rights of such persons arising from transactions done and completed under such ostensible authority by failing to enter upon its minutes any order giving its officers authority to act." *Fowler Gas Co. v. First Nat. Bank*, 180 Cal. 471, 477, 181 P. 663, 666. By this instruction the jury was only told that, if the contract was made by Thompson and the board of directors of the corporation, it was immaterial whether or not the minutes showed the transaction.

[9] None of the other instructions complained of present anything approaching reversible error, and the substance of the one refused was sufficiently covered by other instructions given. The following statement from *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 396, 264 P. 237, 239, applies to the instructions in this case. "Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed. We will not assume that they may not have understood the charge as we understand it. The instructions must be considered in their entirety, and if, as so considered, they state the law of the case fairly and clearly, then they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to just criticism."

[10] Appellant makes the further point that the evidence is insufficient to support a judgment on the second cause of action. Even if this were true, it is ample for a verdict and judgment on the first. The case presents one of the usual situations of sharply conflicting evidence upon which a jury might have found for either of the parties. Under such circum-

stances, an appellate court cannot disturb the verdict.

The trial court is directed to reduce the judgment by deducting therefrom the sum of \$300, with corresponding deduction of interest, and, as so reduced, the judgment is affirmed, respondent to recover costs on appeal.

We concur: CONREY, P. J.; HOUSER, J.



4 Cal.App.2d 461

STRAUS v. STRAUS.

Civ. 9071.

District Court of Appeal, Second District,
Division 2, California.

March 6, 1935.

Hearing Denied by Supreme Court
April 8, 1935.

Stipulations ⇨14(12)

That only two justices participating in reviewing court's opinion were on bench at time of oral argument did not affect validity of judgment rendered, where counsel for both parties stipulated any justice might participate, whether present for argument or not and where it appeared there was no matter included in record not fully considered by court before decision.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

On motion for rehearing.

Motion denied, and former opinion modified.

Prior opinion, 41 P.(2d) 218.

Harry J. Miller, of Los Angeles, for appellant.

Goodman, Bachrack & Brownstone, of Los Angeles (Herman A. Bachrack, of Los Angeles, of counsel), for respondent.

PER CURIAM.

In denying petition for rehearing in this case, we modify our original opinion by striking from the fifth paragraph thereof the words: "From the ineffectual denial by defendant of nonpayment of accrued alimony the trial court may well have concluded that defendant had fled to this state to avoid punishment for contempt of the New York court for such default; and since he had thus,"

and substituting therefor: "Since defendant had evaded," etc.

In response to appellant's suggestion that only two of the justices participating in the opinion were on the bench at the time of oral argument, it appears from the minutes that both counsel stipulated that any justice might participate whether present at time of oral argument or not; and it further appears from a reading of the reporter's notes of the brief argument thus made that there was no matter included in it that was not fully considered by the court before decision.



5 Cal.App.2d 125

VAN FLEET v. WEST AMERICAN INS. CO.

et al. *

Civ. 9337, 9338.

District Court of Appeal, Second District,
Division 2, California.

March 5, 1935.

Rehearing Denied April 3, 1935.

Hearing Denied by Supreme Court
May 3, 1935.

1. False imprisonment ⇨15(1)

Where, under police regulations, desk sergeant and not arresting officer had charge of placing persons in jail, after prisoner was taken to jail and presented to desk sergeant, arresting officer's authority ended, and his performance of mechanical act of turning key in lock or his action next day in taking prisoner out for a while to eat his meals and visit with his family did not constitute new arrest or imprisonment.

2. False imprisonment ⇨22

In action for false arrest and imprisonment, plaintiff does not have burden of establishing want of probable cause.

3. False imprisonment ⇨39

Where facts are not disputed, court must determine whether probable cause existed for arrest (Pen. Code, § 836).

4. False imprisonment ⇨13

"Probable cause" for making arrest may be defined as suspicion founded on circumstances sufficiently strong to warrant reasonable man in belief that charge is true.

[Ed. Note.—For other definitions of "Probable Cause," see Words & Phrases.]

5. Appeal and error ⇨1010(1)

Appellate court is not bound by trial judge's determination as to whether probable

cause existed for making arrest, where facts are undisputed (Pen. Code, § 836).

6. False imprisonment ☞13

Question whether probable cause existed for making arrest must be determined by facts and circumstances presented to officer at time he was required to act (Pen. Code, § 836).

7. False imprisonment ☞13

Where plaintiff reported discovery of stolen automobile, but refused to disclose location thereof until paid a reward, probable cause existed for arresting plaintiff, where arresting officer had had several cases where men had stolen cars and then demanded reward (Pen. Code, §§ 485, 836).

8. False imprisonment ☞15(1)

Where probable cause existed for arrest, and parties with arresting officer did nothing to effect arrest or imprisonment except to transport officer and prisoner to police station, where officer was required to take prisoner, such parties and their employer were not liable for false arrest or imprisonment.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Martin Van Fleet against the West American Insurance Company and others. Judgment for plaintiff, and defendants appeal.

Judgment reversed, with instructions.

Rex Hardy, of Los Angeles (Vernon W. Hunt, of Los Angeles, of counsel), for appellants West American Ins. Co., O. D. Dameron, and I. W. Langeloh.

Ray L. Chesebro, Frederick Von Schrader and D. M. Kitzmiller, all of Los Angeles, for appellant George E. Anderson.

Sparling & Teel, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff brought suit for damages for false arrest and imprisonment against all defendants, and included a second cause of action against defendant Anderson only for assault and battery. The jury returned a verdict in favor of plaintiff against all defendants for \$8,500 actual damages and \$4,000 exemplary damages for the first cause of action. They also returned a verdict against defendant Anderson for \$250 actual and \$250 exemplary damages for the assault. On motion for new trial, the award for exemplary damages as

to each count was deleted. Judgment for the remaining amounts was thereupon entered. This appeal is taken by all defendants from judgment as to the false arrest; no appeal being taken from judgment as to the assault.

An automobile belonging to one Jenkins as registered owner was stolen and the theft reported to the police. Shortly thereafter plaintiff in this case telephoned to Jenkins and also to the person who was "legal owner," informing them that he had discovered the car. He then contacted defendant insurance company, and, after being informed that the car was stolen, he demanded \$5 as the price of information concerning the location thereof or \$10 for delivering it to the office of the insurance company. This demand for compensation was refused. At intervals during a period of more than a week defendant insurance company's employees endeavored to persuade plaintiff to disclose the whereabouts of the car, which he declined to do unless they paid his demand. They suggested he might be arrested, but plaintiff professed disbelief that such a step would be taken. Finally, Langeloh, an employee of the insurance company, called defendant Anderson, a police officer, on the telephone. Dameron, another employee, went over to see him, and together with the officer's partner they went to plaintiff's house. A marked \$5 bill was given plaintiff, and he thereupon led the party to where the stolen car was located. On the way they stopped at a service station, and Anderson claimed he arrested plaintiff when the latter got out there. Plaintiff claimed he was arrested and handcuffed at the place the stolen car was pointed out. It was then about 12:30 p. m. on Saturday, and plaintiff was taken to a Los Angeles city jail, fingerprinted, and booked for "suspicion of grand theft and extortion." The next morning he was taken out by Anderson to have breakfast with his family, and later in the day was similarly escorted to his home, where he stayed for dinner and was then taken back to jail. Monday morning plaintiff was taken to the county jail, and at 4:30 p. m. was discharged from custody.

[1] Evidence was introduced which shows that police regulations provide that the desk sergeant, not the arresting officer, has charge of placing persons in jail. After plaintiff was taken to jail and presented to the desk sergeant the authority of Officer Anderson was at an end. Whether he performed the mechanical act of turning the key in the lock or interceded the next day to obtain for plain-

tiff the exceptional privilege of getting out for a while to eat his meals and visit with his family, there was nothing done by Anderson which could be reasonably construed as a new arrest or imprisonment, and nothing upon which recovery could be predicated in any event beyond the arrest and transportation to jail on Saturday. *Gisske v. Sanders*, 9 Cal. App. 13, 98 P. 43, 44; *Mackie v. Ambassador H. & I. Co.*, 123 Cal. App. 215, 11 P.(2d) 3.

[2-5] The instant case must be distinguished from an action for malicious prosecution, where malice and want of probable cause are the gist of the action. *Neves v. Costa*, 5 Cal. App. 111, 89 P. 860; *Nelson v. Kellogg*, 162 Cal. 621, 123 P. 1115, Ann. Cas. 1913D, 759. There was no burden on plaintiff to establish in this case a want of probable cause. On the other hand, as a defensive matter Anderson and his codefendants undertook to show that as a peace officer he had a right to arrest plaintiff under the provisions of Pen. Code, § 836, which provides that a peace officer may arrest a person without a warrant when a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it, or on a charge, made upon a reasonable cause, of the commission of a felony by the party arrested. If there was probable cause for making the arrest, then the officer acted justifiably and plaintiff is not entitled to recover. The facts on that point were not disputed, and there was therefore no factual issue to be presented to the jury for its determination. "Probable cause may be defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. *Potter v. Seale*, 8 Cal. 217, 221. The court must determine, as a matter of law, whether the facts and circumstances as they appear, or are found to exist, constitute probable cause. *McKenna v. Heinlen*, 128 Cal. 97, 100, 60 P. 668; *McCarthy v. De Armit*, 99 Pa. 63. Hence we are not bound by the conclusion of the trial judge on that point." *Michel v. Smith*, 188 Cal. 199, at pages 205 and 206, 205 P. 113, 116.

[6, 7] Defendant Anderson knew that the automobile had been stolen and that it was so listed on the police reports. He had made two unavailing trips to the home of plaintiff to inquire about the car. Prior to the day of arrest he had considered and discussed with a fellow officer the import of section 485 of the Penal Code, which provides: "One who finds lost property under circumstances which give him knowledge of or means of inquiry

as to the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without first making reasonable and just efforts to find the owner and to restore the property to him, is guilty of theft." He had had several cases where men would go out and steal cars and then call up the insurance company demanding a reward, was under the impression plaintiff was doing the same thing, and testified "that was my belief when I made the arrest, that the car had been stolen by the plaintiff." On this state of facts the trial court properly undertook to make a finding as a matter of law on the question whether there was such probable cause for the arrest as to justify the officer in making it. *Michel v. Smith*, supra. The answer to that question depends upon all the circumstances of each case, but we must look only at the facts and circumstances presented to the officer at the time he was required to act. *Murphy v. Murray*, 74 Cal. App. 726, 241 P. 938; *People v. Kilvington*, 104 Cal. 86, 37 P. 799, 43 Am. St. Rep. 73.

With the conclusion of the trial court that under the facts probable cause did not exist as a matter of law we are unable to agree. On the contrary, it appears that probable cause for the arrest, as above defined, did exist at the time, viewing the facts as they reasonably appeared to the officer. In fact, plaintiff was to some degree appropriating the automobile to his own use as a means of extracting a reward from the owner. "An officer is not liable for false imprisonment for the arrest without a warrant of a person whom he has reasonable grounds to believe is guilty of a crime;" and to permit a judgment to stand under circumstances such as here presented "would result in a miscarriage of justice and would discourage peace officers from performing their duty." *Allen v. McCoy*, 135 Cal. App. 500, 27 P.(2d) 423, 426, 28 P.(2d) 56, 58. As the court declared in *Gisske v. Sanders*, supra: "If it be the law that a police officer acting upon reasonable grounds in making an arrest, even without a warrant, is liable should the arrest be subsequently shown to be improper, it were idle to maintain a police force in the large cities."

[8] The other defendants with Anderson did nothing to effect the arrest or imprisonment except to transport the officer and plaintiff to the police station where the officer was required to take his prisoner, and therefore neither of these defendants nor defendant insurance company is liable. *Mackie v. Ambassador H. & I. Co.*, supra.

Under the undisputed facts of this case, as a matter of law, defendants are not liable for false arrest or imprisonment.

Judgment reversed, and the trial court is instructed to enter judgment for defendants.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 259

RUSSELL v. WEYAND.
Civ. 1386.

District Court of Appeal, Fourth District,
California.
March 14, 1935.

Hearing Denied by Supreme Court
May 13, 1935.

1. Corporations ⇨210

In action instituted by stockholders for benefit of corporation, the corporation, and not plaintiffs, was real party plaintiff, plaintiffs being at most merely nominal parties.

2. Corporations ⇨202

In action brought by stockholders for benefit of corporation, court held under duty to protect interests of corporation and to exercise supervision over conduct of plaintiffs.

3. Compromise and settlement ⇨4

In action brought by stockholders for benefit of corporation, court before whom action was pending, and not plaintiffs had authority to compromise rights of corporation under suitable circumstances.

4. Appeal and error ⇨151(2)

When court, in action instituted by stockholders for benefit of corporation, appointed receiver to protect and safeguard corporation's interests, the original plaintiffs became purely supernumerary parties and could not appeal from order confirming compromise agreement, since not "parties aggrieved" thereby (Code Civ. Proc. § 938).

[Ed. Note.—For other definitions of "Aggrieved Party," see Words & Phrases.]

5. Appeal and error ⇨151(1)

That party is aggrieved by judgment or order is condition on which right to appeal depends under statute (Code Civ. Proc., § 938).

6. Appeal and error ⇨363

When it is obvious to trial court that individual who proposes to prosecute appeal is not aggrieved by order from which it is pro-

posed that appeal be taken, trial court is justified in refusing to certify transcript, since such act would be futile (Code Civ. Proc., § 938).

Mandamus proceedings by A. E. Russell, for himself and as assignee of other stockholders of the Elberta Oil Company, against Ernest Weyand, as judge pro tem. of the Superior Court in and for Kings County, state of California, to compel respondent to certify a transcript on appeal prepared at petitioner's direction to enable him to perfect appeal from order made by respondent in action entitled Russell and others against Rougheot and others.

Alternative writ of mandamus discharged.

J. L. Royle, of Fresno, for petitioner.

Morgan J. Doyle and Walter M. Gleason, both of San Francisco, for respondent.

JENNINGS, Justice.

By this proceeding in mandamus the petitioner seeks to compel respondent to certify a typewritten transcript on appeal prepared at petitioner's direction so that he may thereby be enabled to perfect an appeal from an order made by respondent in a certain action which he and three other persons had instituted. This action was entitled Russell et al. v. Rougheot et al.

[1-3] From the petition and respondent's return thereto, it is apparent that the action of Russell v. Rougheot was one that was instituted by petitioner and his associates as stockholders of a corporation for the benefit of the corporation. It is evident not only from the allegations of the complaint generally but from the particular allegations contained in paragraph XXII of the complaint wherein it is stated: "That plaintiffs institute this said action for and on behalf of the said Elberta Oil Company and all the stockholders thereof." The representative character of the action is further made apparent by the prayer of the complaint. The judgment which was rendered at the conclusion of the trial yields further evidence of the nature of the action. We do not understand that petitioner contends otherwise. The position which plaintiffs occupied in the litigation was therefore the precise equivalent of that which is occupied by a guardian appointed by the court to act for a minor or an incompetent who is a party to an action. The plaintiffs were, so to speak, authorized by statute to act as guardians ad litem for the corporation

of which they are shareholders. The principles governing the conduct of guardians ad litem were therefore applicable to them. The corporation and not plaintiffs was the real party plaintiff in the action. Plaintiffs, if regarded as parties to the suit, could at most be considered merely nominal parties plaintiff. In such a situation it was the duty of the court before whom the action was pending to protect the interests of the corporation and to exercise supervision over the conduct of plaintiffs. The court and not plaintiffs had the authority to compromise the rights of the corporation under suitable circumstances. *Whitten v. Dabney*, 171 Cal. 621, 154 P. 312. That the trial court realized the applicability of the above-stated legal principles to the action brought by plaintiffs against the recalcitrant directors of the corporation and was cognizant of the duty which was imposed upon it under the circumstances is apparent from the provisions of the judgment which was rendered at the conclusion of the trial. This judgment provided that title to various parcels of land and leasehold interests in other parcels belonged to the corporation and not to the persons who had acquired record title or who were the record owners of such leasehold interests. The latter were adjudged to be trustees of the interests which they had acquired for the corporation and were ordered to transfer such interests to the corporation. To effectuate such transfer and to make certain that it was accomplished, the court appointed a receiver who was specifically ordered and directed to execute the necessary conveyances and assignments to the corporation in the event that the various defendants in the action should fail, within a limited period of time, to comply with the court's order. It was further recited that the receiver was appointed for the purpose of carrying the judgment into effect. The possibility that a compromise of the judgment might be considered was recognized and it was specifically provided that the receiver should have no power or authority to make a compromise or to release any of the judgment debtors except upon the court's order authorizing such compromise. The court further expressly retained jurisdiction of the action until the judgment should be carried into effect.

The petition shows that an appeal from the judgment was perfected by the defendants in the action, and that while such appeal was pending, a compromise of the judgment was sought to be effected. The trial court's officer, the receiver, evidently arrived at the conclusion that the compromise would be for the best interests of the corporation for whom he

was acting. In exact conformity with the provisions of the judgment he thereupon sought the court's consent to and approval of the compromise. Petitioner herein was notified that the compromise agreement would be presented for the court's approval and he was present and was represented by counsel when the matter came before the court. At this time he presented his objections to the approval by the court of the proposed compromise. It should further be observed that, subsequent to the rendition of the judgment, the stockholders of the corporation had selected an entirely new directorate; that the new directors had approved the compromise; that the compromise was then submitted to the stockholders at a meeting duly called for the purpose; and that a large majority of those shareholders who were present or represented by proxies approved the compromise. It is significant that the record shows that petitioner was present at this meeting; that he controlled 5 shares of stock; and that he did not vote these shares on the question of whether or not the compromise agreement should be approved. The record also shows that when the compromise was submitted to the court for its approval, the court received evidence and came to the conclusion that the compromise was proper, and in all respects a fair, just, and equitable compromise, that it was beneficial and advantageous to the corporation and should be approved and confirmed. It further appears that the compromise agreement expressly provided that the defendants in the action instituted by petitioner and his associate shareholders should dismiss the appeal taken by them from the judgment rendered in the action and that the appeal was duly dismissed.

From the trial court's order approving and confirming the agreement for compromise of the judgment, petitioner gave notice of appeal and ordered a typewritten transcript prepared for the prosecution of this appeal under the alternative method. Petitioner then gave notice that on a certain date the transcript would be presented to the trial court for approval and certification. Upon presentation of the transcript, the trial court refused to certify the same. The petitioner then filed his petition in the Supreme Court for the issuance of a writ of mandate directed to the trial court requiring said court to certify the transcript prepared as aforesaid. The Supreme Court thereupon ordered that an alternative writ of mandate issue and referred the matter to this court for hearing and determination. This court then issued the alternative writ requiring the respondent court

to certify the transcript on appeal or to show cause on a specified date why it had not done so. Respondent has duly filed a return to the petition. The question which is here presented is whether upon the facts set forth in the petition and in respondent's return there-to this court shall order respondent to certify the transcript or discharge the writ.

It is petitioner's contention that he was clearly entitled to appeal from respondent's order confirming the compromise agreement; that respondent was not justified in refusing to certify the transcript on appeal; and that respondent should now be required to certify the same.

[4] In opposition thereto respondent contends, first, that the order from which an appeal was sought to be taken was not an appealable order, and, second, that even if it is, petitioner is not entitled to perfect an appeal therefrom since he is not a party who may properly be declared to be aggrieved thereby.

It is our conclusion that the second of respondent's above-stated contentions is clearly correct and must be sustained. If, as was decided in *Whitten v. Dabney*, supra, petitioner and his coplaintiffs in the original action which they instituted against the recalcitrant directors of the corporation are not entitled to be regarded as parties to the action, then they have no right to take the appeal which forms the background for petitioner's application for a peremptory writ of mandate in the present proceeding. Certainly if, as was declared in the last-mentioned decision, the respondent court, and not petitioner and his associates, was empowered to compromise the rights of the corporation, it is obvious that the respondent has exercised this authority. It is further manifest that the respondent recognized the duty imposed upon it of fully protecting the rights of the corporation. Respondent's insistence of assuring adequate protection to the corporation is evidenced by the appointment of a receiver who was expressly directed to effectuate the court's express order that the property which the court had found belonged to the corporation should be conveyed to the corporation. The possibility that an effort might be made to compromise the judgment was not overlooked and the respondent court specifically provided that its receiver should have no power or authority to compromise the judgment or to release any of the judgment debtors except upon the approval of respondent and jurisdiction over the action was expressly retained until the judgment should be carried into effect.

It is our opinion that the reasoning of the decision in *Loeb v. Berman*, 217 Cal. 716, 20 P. (2d) 685, 686, is directly applicable to the situation which is here presented. That there are some points of differentiation between the present proceeding and the cited case may be conceded. In *Loeb v. Berman*, supra, a group of stockholders of the Sunset Pacific Oil Company, the successor of the Julian Petroleum Corporation, urged that a cause of action existed against certain individuals because of the issuance and sale to the public of spurious stock certificates in the Julian Corporation which had produced great profit to the wrongdoers at the expense of the corporation. These stockholders accordingly demanded of the corporation that it sue said parties for an accounting as to these profits. The corporation at first failed to act on the demand whereupon Loeb and two other stockholders instituted an action on behalf of the corporation for the purpose of regaining the said alleged profits for the corporation. The corporation itself was made a party to the suit although no relief was sought against it, nor was any director or other officer made a party. Up to this point there is only one feature which differentiates the action taken in the cited case from the action originally instituted by petitioner and his associates. This is that a demand was first made upon the corporation to bring the action. No such demand was made prior to the institution of the action by this petitioner. The reason for the lack of such demand is obvious. In petitioner's suit the action was brought against the entire directorate of the corporation which was alleged to have been flagrantly derelict in the duty which it owed to the corporation. The futility of demanding that the corporation which was under the control of the very persons against whom the cause of action was alleged should bring the suit is apparent.

In the *Loeb Case* the corporation which had refused the demand of its stockholders to bring the action suffered a change of heart and thereupon filed a cross-complaint in the action urging the same cause of action and seeking relief against the same defendants who were named in the suit, but asking no relief against its stockholders who had brought the action. This is also a point of differentiation between the action brought by petitioner and that brought by the stockholders in the *Loeb Case*. The reason for this difference is likewise apparent. It could not be expected that the corporation in petitioner's suit, since it was controlled by the very defendants

against whom relief was sought, would experience any change of heart. The corporation in this proceeding therefore did not file any cross-complaint or in any manner seek to render its directors accountable for the fraud which was alleged to have been perpetrated upon it.

In the Loeb Case a receiver was appointed for the corporation and was substituted for the corporation in the action. Thereafter the receiver applied to the court for its approval of a proposed compromise and settlement of the action. This application was granted after a hearing and the court made its order approving the compromise. The plaintiffs thereupon took an appeal from the order. This appeal was dismissed by the Supreme Court on the ground that the appellants had become purely supernumerary parties to the action from the time the corporation, acting in good faith, had filed its cross-complaint declaring the same cause of action which was set forth in the complaint and therefore appellants could not be regarded as parties to the action who were aggrieved by the order and entitled to appeal therefrom. The decision noted that an additional reason for refusing to consider the appeal existed by reason of the fact that a receiver for the corporation had been appointed with power to act and with specific authority to compromise the litigation.

Petitioner, in addition to the points of differentiation between the Loeb Case and the present proceeding which have already been noted, stresses the following facts: That in the Loeb Case a receiver was appointed by the court who was substituted in the action for the corporation and who was expressly authorized to compromise the litigation. These facts, it is urged, sufficiently distinguish the decision in the Loeb Case from the situation which is here presented and render the opinion in the Loeb Case inapplicable to the present problem. With this contention we cannot agree. While it is true that in the Loeb Case a receiver with specific authority to compromise had been appointed for the corporation and had been substituted for the corporation, this was only one ground upon which the decision was based. This is evident from the following language used by Justice Preston when, after observing that the receiver had supplanted the corporation in the action, he

said: "Hence upon two grounds at least the stockholders are in no position to be heard." The other ground is that from the time the corporation appeared in the suit the stockholders became supernumerary parties in the action. While it is true that in the instant proceeding the corporation never appeared, it must be remembered that the action originally instituted by petitioner and his associates was brought for the benefit of the corporation and the relief which was sought was for the advantage and benefit of the corporation. Certainly when the court, recognizing the character of the action, appointed a receiver to protect and safeguard the interests of the corporation, petitioner and his associates then became purely supernumerary parties to the action and could not be considered as aggrieved by the order from which they sought to perfect an appeal. We therefore regard the reasoning in *Loeb v. Berman*, *supra*, as directly applicable to the problem here presented and decisive of it.

[5, 6] Petitioner further contends that the respondent was not justified in refusing to certify the transcript because it is said that this refusal was tantamount to a prejudgment by the respondent trial court of petitioner's right to appeal which is declared unjustified and unwarranted. It is confidently urged that petitioner had the right to appeal from the court's order and a determination of whether the appeal is proper or whether it shall be dismissed as improper is not for the trial court, but is a question to be decided by the court to which the appeal may be taken.

This contention is not convincing. Section 938 of the Code of Civil Procedure provides that any party aggrieved may appeal. That a party shall be aggrieved by a judgment or order is therefore a condition upon which the right to appeal depends. When, therefore, it is obvious to a trial court that an individual who proposes to prosecute an appeal is not aggrieved by the order from which it is proposed that the appeal be taken, the trial court is certainly justified in refusing to lend its assistance to an act which is obviously idle and futile.

For the reasons stated, the writ heretofore issued is discharged.

We concur: BARNARD, P. J.; MARKS, J.

5 Cal.App.2d 208

MAGARIAN v. MOSER et al.

Civ. 1366.

District Court of Appeal, Fourth District,
California.

March 9, 1935.

1. Judgment ⇨215

Where findings are required, court's decision is rendered when findings are filed with the clerk, and, until then, court may amend findings and enter judgment different from that first announced (Code Civ. Proc. §§ 632, 633).

2. Judgment ⇨256(1), 527

Judgment as entered must be supported by, and conform to, the findings, but, where judgment and findings agree, they must stand unaffected by any inconsistency with opinion rendered by trial court (Code Civ. Proc. §§ 632, 633).

3. Automobiles ⇨227(5)

Where trial court properly found that driver of forward truck was negligent in suddenly swerving in front of passing truck after receiving signal of intention to pass, and driver of following truck was not negligent, doctrine of last clear chance did not apply.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Major Magarian against Silas Moser and others, who filed a cross-complaint. From a judgment for defendants, plaintiff appeals.

Affirmed.

Clyde Cate and Ray W. Hays, both of Fresno, for appellant.

Harold M. Child, of Fresno, and Halbert & Stone, of Porterville, for respondents.

ALLYN, Justice pro tem.

This is an appeal by plaintiff from a judgment in favor of defendants on their cross-complaints in an action arising out of a collision between two automobile trucks. Both drivers were proceeding in a general easterly direction, the plaintiff, driver of the leading truck, well to the right-hand side of the pavement. One of the defendants, driving the overtaking truck proceeding at a greater rate of speed, sounded his horn, turned to the extreme left of the road, giving sufficient clearance to pass. When he was but a few feet from the rear of the first truck, its driver

suddenly swerved to the left into the path of the overtaking vehicle and was struck by it.

The findings of the trial court are against plaintiff and in favor of the defendants on the issues of negligence, and as conclusions of law judgment was ordered against plaintiff on his complaint and in favor of the defendants on their cross-complaints. The trial court, in addition to its formal findings and conclusions, filed a written opinion which is in some respects inconsistent with the findings and conclusions. There is, however, no lack of conformity of the judgment with said findings and conclusions.

[1, 2] When findings are required, the decision of the court is rendered when they are made and filed with the clerk as required by sections 632 and 633 of the Code of Civil Procedure. The court retains power to amend and change them and to enter judgment different from that first announced. This power continues until the entry of the judgment. *Brownell v. Superior Court*, 157 Cal. 703, 109 P. 91. We have been shown no authority to support appellant's argument that the written opinion of the trial judge constituted a part of the court's decision and that its inconsistency with the findings and conclusions filed deprives the judgment of the support and conformity required by law. It is obvious that the judgment as entered must be supported by, and conform to, the findings (*Nesstor v. Burr*, 124 Cal. App. 369, 12 P.(2d) 479), but it seems equally clear that a written opinion of the trial court is no more a part of the decision rendered than an oral pronouncement can be and that such opinion, even if inconsistent with the formal conclusions reached by the court, cannot be made the basis for a reversal when the findings, conclusions, and judgment are consistent.

[3] It is argued that the driver of defendant's truck had the last clear chance to avoid the collision, and hence plaintiff should have taken judgment. This argument is based upon false premises: First, that the defendant's driver was negligent; and, second, that plaintiff's negligence did not continue to the moment of the impact. The trial court on conflicting evidence found adversely to plaintiff on each of these questions. There is ample evidence to support both the finding that the defendant's driver was not negligent in attempting to pass plaintiff's truck after giving an audible signal and turning a safe distance to the left of the highway, and the further finding that the plaintiff was negligent in swerving suddenly to the left into

the path of the overtaking vehicle. Even if the driver of defendant's truck had been found to be negligent, it does not appear that the last clear chance doctrine would apply because, in order to do so, it must have been found that the defendant's driver could, by the exercise of reasonable diligence, have avoided the collision, and further that the plaintiff was not actively and contemporaneously at fault until the moment of the impact. *Rasmussen v. Fresno Traction Co.*, 138 Cal. App. 540, 32 P.(2d) 1091.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



5 Cal.App.2d 137

PEOPLE v. QUONG.

Cr. 176.

District Court of Appeal, Fourth District,
California.

March 5, 1935.

Rehearing Denied March 19, 1935.

1. Poisons ☞9

In prosecution for possession of opium where state had made prima facie case, defendant's knowledge of presence of opium held for jury.

2. Criminal law ☞938(1), 1156(3)

In prosecution for possession of opium, granting or refusing new trial, on basis of another party's affidavit admitting ownership of opium compound and smokers' articles found in accused's room, was discretionary, and would not be disturbed, in absence of abuse of discretion.

3. Criminal law ☞941(1)

In prosecution for possession of opium, trial court held not to have abused discretion in refusal of new trial on basis of affidavit admitting another's ownership of opium and smokers' articles found in accused's room, since such affidavit was at most corroborative of accused's testimony at trial.

On Motion for Rehearing.

4. Poisons ☞9

Evidence held to sustain conviction for possession of opium.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Charley Quong was convicted on the charge of possession of opium, and he appeals.

Affirmed.

Glen Aldrich, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

ALLYN, Justice pro tem.

Defendant appeals from a judgment of conviction on the charge of possession of opium and from an order denying his motion for a new trial. For reversal he depends upon the insufficiency of the evidence to support the conviction and upon an affidavit of one Yee Haw, filed in support of his motion for a new trial, wherein said Yee Haw states that he was the guilty party and that defendant had no knowledge that the opium was on his premises.

[1] There is ample evidence to support the jury's conclusion that the defendant is guilty. He was arrested on his premises in company with other Chinese after the officers had forced entry. While he had been absent from Bakersfield for several months, he had returned the day before his arrest and had spent the night in his room. At the time of his arrest many articles used by opium smokers were spread upon a table in the room in full view. There was a strong odor of opium smoke, and a quantity of yen shee, containing more than 2 per cent. of opium, was among the articles found on the table. The defense that defendant had no knowledge of the presence of the opium created at most a conflict with the prima facie case made out by the prosecution showing that the opium was in his possession. This defense was for the consideration of the jury. *People v. Randolph*, 133 Cal. App. 192, 23 P.(2d) 777.

[2, 3] The affidavit of Yee Haw, wherein he admits the ownership of the yen shee and of the smokers' articles and attempts to exonerate the defendant, is at most corroborative of the latter's testimony at the trial. The granting of the motion for a new trial in such a case rests in the sound discretion of the trial court, and its judgment will not be disturbed on appeal, unless it manifestly appears that this discretion has been abused. *People v. Ledbetter*, 106 Cal. App. 109, 288 P. 832. There is ample justification in the record for the ruling of the trial court.

The judgment and the order denying defendant's motion for a new trial are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

On Motion for Rehearing.

MARKS, Justice.

Defendant has filed a petition for rehearing wherein he confidently asserts that the evidence is entirely insufficient to support the verdict and judgment and intimates that we placed an unjustified construction upon the evidence. This may be due to the extremely abridged statement of facts in the opinion. We have again carefully reviewed the record and find it necessary to adhere to our former opinion. Our reasons for this conclusion, in addition to those already given, will be made clear by a summary of the evidence.

[4] Defendant was the lessee or owner of the building in which he was arrested, but had not personally occupied it for some time. He had not been in it between January 1 and April 5, 1934, as he was operating a store in the city of Corcoran.

The building in Bakersfield was constructed of brick and had a ground floor and basement. On the ground floor was a room formerly used to operate a store, a bedroom, another room which one witness referred to as an office, and a kitchen. In the basement were one or more bedrooms and a large storeroom in which were two cots. A stairway led from the basement and into the office on the main floor through a trapdoor. A high window with bars on the outside opened from this room. We cannot give a more detailed description of the interior because the witnesses testified from a drawing on a blackboard which is not reproduced in the record. Any question on the sufficiency of the evidence caused by the absence from the record of a photographic copy of the drawing, or other reproduction of this drawing, must be resolved against defendant, because it was his duty to furnish us with a complete record, showing errors, if any there be.

On the night of April 5, 1934, defendant slept in his bedroom on the ground floor of the building. He visited personal friends and attended to his business on the next day and returned to the building at about 11 o'clock that night. At about 11:45 o'clock police officers armed with a search warrant sought

admission. They broke open the front door, but could not force their way into the living quarters on the ground floor. They forced an entrance into the basement by the use of a sledge hammer, and started an attack on the trapdoor, when it was opened by Joe Poy. On entering the "office," they found defendant there in company with Poy.

The following articles pertaining to the smoking of opium were admitted in evidence and were identified as having been found in the office when it was searched in the presence of defendant: Two wooden pillows used by opium smokers; two opium pipe bowls; a tin box containing yen shee; five small tins containing scrapings of opium and yen shee; a third opium pipe bowl containing a deposit on its inside; a box containing yen shee; tools for cleaning opium pipe bowls; one or two peanut oil lamps. One witness testified that these articles were in plain sight in the room where defendant and Poy were found. John G. Lounsbury, one of the arresting officers, testified that there was a distinct odor of opium smoke in the room. An opium pipe had been dropped out of the window of this room. Other articles used by opium smokers and opium and yen shee were found in the basement.

We are of the opinion that the foregoing evidence is sufficient to support the inference which the jury drew that the defendant had opium in his possession at the time of his arrest.

The newly discovered evidence offered in support of the motion for new trial is set forth in an affidavit of Yee Haw, who sought to take entire responsibility for the presence in the building of the opium, yen shee, and opium smoker's equipment found by the officers. It appears from the affidavit that Yee Haw had been charged with possession of opium and convicted, and that after his conviction he offered to relieve defendant from the charge against him by assuming responsibility for the contraband found. Under these circumstances, and in addition to the reasons already given, we cannot conclude that the trial judge abused his discretion in denying a new trial because of this newly discovered evidence, if such it could be called.

The petition for rehearing is denied.

We concur: BARNARD, P. J.; JENNINGS, J.

5 Cal.App.2d 39

PEOPLE v. MEDLER et al.

Cr. 2621.

District Court of Appeal, Second District,
Division 2, California.

March 1, 1935.

Hearing Denied by Supreme Court

March 29, 1935.

1. Criminal law $\hookrightarrow$ 374**Robbery** $\hookrightarrow$ 24(3)

Clear and explicit assertion by each witness in robbery trial that defendants perpetrated crime, and evidence that general plan in all robberies charged by indictment was the same, *held* sufficient to identify defendants.

2. Criminal law $\hookrightarrow$ 706, 1171(1)

District attorney's interrogation of prosecution witnesses as to similarity of clothes, shown witnesses and offered, but not admitted, in evidence, to clothing worn by men who held up witnesses, *held* not prejudicial misconduct warranting reversal of robbery convictions.

3. Criminal law $\hookrightarrow$ 730(3)

District attorney's question to woman, testifying for defense, as to whether there was connecting door between adjoining hotel rooms occupied by her and male defendant, *held* not misconduct justifying reversal of robbery conviction, where objection thereto was sustained.

4. Criminal law $\hookrightarrow$ 865(1)

Trial court's question to jury, after agreement on all but one count of indictment, as to probability of arriving at verdict and intimation that if they failed to agree on remaining count court might receive verdicts on other counts and discharge jury, which again retired and reached verdict on remaining count, *held* not abuse of discretion, in absence of any hint of rebuke or importunity.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Henry Medler and Chester De Larvalard were convicted of first-degree robbery and for possession of a deadly weapon after conviction of a felony, and they appeal.

Affirmed.

Clark & Olmstead, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendants were convicted by a jury of nine counts of first-degree robbery and by the court of violation of chapter 339, p. 695, Statutes of 1923, as amended in 1931, Act 1970, § 2, "Deadly Weapon Act" (Deering's Gen. Laws 1931, vol. 1, p. 901), for possession of deadly weapon after conviction of a felony. From judgments thereon and orders denying motion for new trial they appeal.

[1] It is first urged that identification of defendant was insufficient. An examination of the transcript shows a clear and explicit assertion by each witness that defendants were those who perpetrated the crime. The similarity in offenses is noted by appellants in their opening brief: "The evidence shows the general plan in all nine robberies was the same; that certain individuals came to the * * * stores either just as they were opening in the morning or just at the closing time in the evening; that two men were acting together; that they would come in, one of them make a small purchase and then hold up the employees in the store, locking them in the washroom and taking the cash out of the cash register or wherever it could be found." This tends to confirm the correctness of the jury's conclusion.

[2, 3] Certain clothes were shown to witnesses for the prosecution and they testified that the clothing was similar to that worn by the men who held them up. The articles were offered but were not admitted in evidence. The questions asked concerning them are declared to have been prejudicial misconduct by the district attorney. The latter also asked a woman who was a defense witness, and who had a room adjoining that of defendant De Larvalard in a hotel, whether there was a connecting door between the rooms. Objection to the question was sustained, and it is assigned as misconduct. We find no merit in these contentions.

[4] When the jury had agreed on all but one charge, they were brought into the jury box and asked by the court, "Is there any probability of arriving at a verdict?" It was intimated that if they failed to agree on the one remaining count the court might decide to receive their other verdicts and discharge them, but there is no hint of rebuke or importunity in the words used. They again retired and reached a verdict on the remaining count. It appears that the trial court was well within the limits of its discretion in this matter.

There is abundant evidence to support conviction of each defendant on each charge. It appears that each was accorded a fair trial and that denial of a new trial by the court was proper.

Judgments and orders affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 154

HINE v. LEPPARD et al.*

Civ. 8937.

District Court of Appeal, Second District,
Division 1, California.

March 6, 1935.

Rehearing Denied April 1, 1935.

Hearing Denied by Supreme Court
May 3, 1935.

1. Appeal and error ⇐1011(1)

Whether motorist who drove into rear of stalled truck at night was contributorily negligent held for trial court, where evidence as to whether truck carried statutory lights or was otherwise lighted was conflicting (Gen. Laws 1931, Act 5128, §§ 106, 136).

2. Negligence ⇐136(8)

Question of contributory negligence is for jury, except when facts are clear and undisputed and admit of but one inference.

3. Automobiles ⇐168(1)

Automobile driver must expect to meet persons at any point of street and keep his automobile under such control as will enable him to avoid collision with another person using proper care and caution.

4. Automobiles ⇐173(5)

Driver of stalled, but not disabled, truck, who fails to display statutory lights, is guilty of negligence (Gen. Laws 1931, Act 5128, §§ 106, 136).

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Roland W. Hine against O. D. Leppard, who filed a cross-complaint, and Jack McClanahan. From a judgment for plaintiff, the defendants appeal.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

John B. Haas and John D. Home, both of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiff had judgment for personal injuries and the value of his automobile. The defendants' principal point on appeal is that the evidence shows that plaintiff was guilty of contributory negligence as a matter of law.

The accident sued upon resulted from an automobile which plaintiff was driving being driven into the rear end of a truck owned by one defendant and being operated by the other. The collision occurred between 2 and 3 o'clock in the morning on a straight paved highway 20 feet wide 25 or 30 miles north of Brawley. Though dark at the time of the accident, the atmosphere was clear.

The highway was slightly up grade in the direction in which the truck carrying a load of lettuce was traveling. Shortly before it reached the scene of the accident, the vacuum tank went dry and the engine began to die. The driver made no effort to pull off to the side of the highway, but stopped on the paved portion with the right-hand wheels approximately 2 feet from the right-hand edge of the pavement. He then got off the truck to get some gasoline from the reservoir tank, and while on the ground looked to the rear and observed the plaintiff's car approaching. According to his testimony, all of the lights on the truck were lighted at that time. He made no effort to warn the driver of the oncoming car, which crashed into the stalled truck. The impact drove the truck forward 3 or 4 feet, and both vehicles caught fire.

Plaintiff testified that just before the accident occurred he was traveling between 35 and 40 miles per hour. He saw a car approaching at a distance which he estimated to be one-quarter of a mile, and dimmed his lights, or, to describe it more correctly, changed their focus so that the rays were lowered. At that time he was 200 feet from the truck with which he collided, and the three vehicles were the only ones in the immediate vicinity. With the changed focus of the lights he could see 50 feet ahead of his car, and he continued to drive at the same rate of speed.

Further relating what occurred, he said that suddenly an object loomed up in front which at first seemed to be a pile of rocks or a house on the side of the road; that he was 40 feet away when he first noticed it; that he was not sure in the few seconds that followed what it was, until his lights "took it in full"; then he realized it was something that was on the highway. He applied both foot

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 43 P.(2d) 595.

and emergency brakes, but could not avoid the collision.

The driver of the on-coming car stated that he saw the truck burst into flame when he "was about a half a mile or so" from it. Whatever the exact distance, the accident did not occur when this car and plaintiff's car were passing, or even closely approaching. He testified that he did not see any light on the truck, and the driver of the car coming from the opposite direction testified that the headlights of the truck were not burning as he approached it. This testimony was in direct conflict with that of the truck driver, who testified that all of the lights on the truck were lighted at the time of the accident. The driver explained the mechanism of the lights was such that none could burn unless all were lighted; if the headlights of the truck were lighted, the tail-light was lighted. However, the condition of the tail-light immediately before the accident was a matter of dispute, and there is ample evidence to support the finding of the trial court that the truck was not lighted at the time of the accident.

[1] Under this evidence, a court cannot say that the plaintiff was guilty of contributory negligence as a matter of law. The accident may have been caused by the failure of the truck to display a warning light to the rear, rather than by the shortened focus of the headlights on the plaintiff's automobile. The California Vehicle Act (Deering's Gen. Laws [1931 Ed.] Act 5128, § 106) required the truck to "carry at the rear a lighted lamp exhibiting a red light plainly visible under normal atmospheric conditions for a distance of five hundred feet toward the rear. * * *" Had the truck displayed such a light, the plaintiff might have seen it in time to have avoided the collision. It was not necessary for him to have stopped. Had he seen the truck in time, he could have gone around it. The issue of contributory negligence was therefore one of fact and not of law.

[2] As was pointed out in *Gammon v. Wales*, 115 Cal. App. 133, 300 P. 988, 989: "The law is well settled that the question of contributory negligence, like that of negligence, is a question for the jury, and only when the facts are clear and undisputed, and when no other inference than that of negligence or contributory negligence can be drawn from such facts, is the court authorized to withdraw the question from the consideration of the jury." That also was a case where an automobile collided with a truck

and the court held: "The only possible theory upon which contributory negligence might be charged against plaintiff would be that he should have, as a reasonable person, seen, by means of the lights of his own car, the parked truck in the road ahead of him in time to have avoided the collision. This, of course, as we have already stated, was a question of fact to be submitted to the jury, under proper instructions, and is in no sense a question of law, as urged by defendants. * * * In *Philadelphia & R. Ry. Co. v. Dillon*, 1 W. W. Harr. ([31] Del.) 247, 114 A. 62, 64, 15 A. L. R. 894, it is said: 'A traveler on a highway by day or night may expect that it will not be obstructed unlawfully or in such manner as to cause him injury while he himself is in the exercise of due and reasonable care, and what is such care depends on the circumstances of each case.'" See, also, *Smarda v. Fruit Growers' Supply Co.* (Cal. App.) 36 P. (2d) 701.

[3] Appellants assert that the plaintiff had no right to assume that the road was clear. The duty of an automobile driver in this regard is that he must "anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop." *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 340, 208 P. 125, 127." *Rush v. Lagomarsino*, 196 Cal. 308, 317, 237 P. 1066, 1069.

[4] Those whom he must anticipate meeting are, it will be noticed, persons using proper care and caution. "While himself exercising ordinary care, he had the right to presume that the street in front of him would not be obstructed unlawfully or in such manner as to cause him injury." *Smyth v. Harris & Devine* (Cal. App.) 38 P.(2d) 862, 865. The driver of a stalled truck on a highway who allows it to remain there without lights not only fails to use proper care and caution, but is also violating California Vehicle Act, § 136, *supra*, if the vehicle is not disabled. Whether or not the driver could have run the truck off of the highway before it stopped was a question of fact which was decided adversely to the defendants, and there is evidence to support the findings of the trial court.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

5 Cal.App.2d 111

SPEAR v. FARWELL et ux.

Civ. 9008.

District Court of Appeal, Second District,
Division 1, California.

March 5, 1935.

Hearing Denied by Supreme Court
May 3, 1935.

1. Evidence ⇨433(6)

Testimony of wife, filing third party claim to bank deposit after levy of execution thereon under judgment against husband, that spouses signed signature card in belief that it authorized husband to check on account only after wife's death, *held* not inadmissible as varying terms of written deposit agreement by parol evidence; purpose being to show that wife entered into contract under mistake of law (Civ. Code, § 1578; Gen. Laws 1931, Act 652, § 15a).

2. Husband and wife ⇨149(1)

Husband, wife, and bank, entering into deposit agreement, declaring spouses owners of deposit as joint tenants, subject to withdrawal by either spouse or survivor, under misapprehension of law that husband could check on account only after wife's death, *held* entitled to release of deposit from claims of husband's judgment creditor (Civ. Code, § 1578; Gen. Laws 1931, Act 652, § 15a).

3. Estoppel ⇨52

"Estoppel" is rule of evidence precluding man from alleging or denying fact because of his previous action, inaction, allegation, or denial leading another so to conduct himself that he would be damaged if truth were established.

[Ed. Note.—For other definitions of "Estoppel," see Words & Phrases.]

4. Husband and wife ⇨129(3)

Wife, without knowledge of husband's execution of note on which judgment was obtained against him until time of action thereon, *held* not estopped to show that bank account in their names as joint tenants was opened and continued by wife in belief that husband could check thereon only after her death, in absence of claim that credit was extended to judgment creditor on representations as to such account, or showing that such creditor knew anything about it until levy of execution thereon.

5. Husband and wife ⇨149(1)

Husband having no title to any of money deposited by wife in bank under misapprehension of law that husband could check on account only after her death, his judgment creditor, who acquired no greater right to funds than judgment debtor, got nothing by levy of execution on deposit.

6. Attachment ⇨63

Judgment creditor, attaching property for debt, obtains lien only on debtor's title or interest therein at time of levy and gets nothing thereby if all title and interest has passed from debtor to third person.

7. Judgment ⇨780(1)

Lien of judgment affects only judgment debtor's actual interest in property levied on, and equity court will permit real owner to show that debtor's apparent ownership is not real.

8. Judgment ⇨780(5)

Lien of judgment does not attach to property in which judgment debtor has no interest except naked legal title.

Appeal from Superior Court, Los Angeles County; Leo Aggeler, Judge.

Action by Emerson Spear against Lyman Farwell, against whom plaintiff had judgment under which execution was issued and levied on a bank account, to which Flora Howes Farwell, defendant's wife, filed a third party claim. From an order releasing the account from plaintiff's claims and demands, he appeals.

Affirmed.

Chas. I. Rosin and A. S. Goldman, both of Los Angeles, for appellant.

Barker, Smiley & Keithly, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiff had judgment against Lyman Farwell in an action brought solely against him upon a promissory note. Thereafter, execution was issued and levied upon a bank account standing in the names of Lyman Farwell and Flora Howes Farwell, his wife, as joint tenants. Mrs. Farwell filed with the sheriff her third party claim to the money as being her sole property in which her husband had no interest. Upon a hearing in response to plaintiff's motion to determine title to the money, the superior court made its order finding that Mrs. Farwell was the owner of the bank deposit and releasing it from the claims and demands of the plaintiff. From this order plaintiff appeals.

[1, 2] Over objection of the plaintiff, Mrs. Farwell was allowed to testify that prior to 1924 she had a bank account in her own name; that in May of that year she went to the bank and asked a teller what kind of a card she and her husband could sign where-

by her husband could draw on the account in the event of her death. She testified that she explained to the teller that she had quite a household to manage and she wanted it to be possible, if anything happened to her, that there would be money to run the household until her estate could be settled. Mr. Farwell was present at this conversation. Thereupon, Mrs. Farwell testified, the bank teller prepared a new signature card and deposit agreement which she and Mr. Farwell signed. According to her testimony she and Mr. Farwell signed the new "card" in the belief that it would only allow Mr. Farwell to check on the account after her death. The balance then standing to her individual credit at the bank was on the same day transferred by it to the new account.

The deposit agreement signed by Mr. and Mrs. Farwell recites: "That all sums now on deposit or hereafter deposited by the undersigned, or either of them, to the credit of the undersigned with said bank in this savings account, are and shall be owned by the undersigned as joint tenants (and not as tenants in common), with full right of survivorship but be subject to order of or withdrawal by either, or the survivor of either."

The evidence shows without contradiction that all of the money standing to Mrs. Farwell's individual credit at the bank and transferred to the joint account, and also all money thereafter deposited was income from or proceeds of Mrs. Farwell's separate property and estate owned by her before her marriage. No checks were ever drawn by Mr. Farwell on the account. Also, Mr. and Mrs. Farwell testified that during her extended absence at one time special authority was given their son to sign checks on the account, because of their understanding that Mrs. Farwell was the only one who could do so during her lifetime.

Appellant contends that parol evidence was admitted to vary the terms of a written agreement. This was neither the purpose nor the result of such evidence. The claim of Mrs. Farwell is that she entered into a contract under a mistake of law, and she asked the court to find that she was the sole owner of the money in the bank account, notwithstanding such contract. Our Civil Code defines a mistake of law as "a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law." Civ. Code, § 1578. The evidence in this case shows a contract entered into by each of the parties under the same misapprehension as

to the law. They were entitled to be relieved from the effects of such a contract. The Bank Act (Deering's Gen. Laws, 1931 Ed., Act 652, § 15a) provides that a deposit in the names of two or more persons as joint tenants shall, "in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors." This particular section was considered in the case of *Hill v. Badely*, 107 Cal. App. 598, 601, 290 P. 637, 639, where the court said: "The provisions of the act, we think, refer exclusively to an action where one of the parties named in the account is dead. During the lifetime of both of the depositors either one would have the right to establish the real fact, whatever it might be, with reference to the account, and would have the right to bring an action in respect thereto."

[3, 4] There is no principle of estoppel which would bar Mrs. Farwell's right to seek relief from her contract. "Estoppel is a rule of evidence by which a man is precluded from alleging or denying a fact, in consequence of his own previous action, inaction, allegation, or denial which has led another to so conduct himself that, if the truth were established, that other would be damaged. 3 Black. Com. 308." *Lake v. O'Brien*, 54 Cal. App. 543, 202 P. 158. There is no claim that credit was extended to the judgment creditor on any representations as to this account. Indeed, there is nothing in the record to indicate that the judgment creditor ever knew anything about it until the time of the levy of the execution. There is not the slightest evidence of any knowledge by Mrs. Farwell of the making of the note on which judgment was obtained, or of any facts in connection with it until the time of this action. She is not, therefore estopped from showing the facts and circumstances under which the bank account was opened and continued by her.

[5-8] The judgment creditor acquired no greater right to the funds on deposit than the judgment debtor had. Mr. Farwell having no title to any part of the money the judgment debt creditor got nothing by his levy. "The law is well settled that the lien of a judgment does not attach to a naked title, but only to the judgment debtor's interest in the real estate; and if he has no interest, though possessing the naked title, then no lien attaches. *Riverdale Mining Co. v. Wicks*, 14 Cal. App. 526, 112 P. 896. Thus a creditor who attaches property

for his debt obtains a lien only upon the title or interest which the debtor has in the property at the time of the levy, and if at that time all title and interest has passed from him to a third person, the creditor gets nothing by the levy. *National Bank of Pacific v. Western Pac. R. R. Co.*, 157 Cal. 573, 108 P. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391. The interest which the lien of judgment affects is the actual interest which the debtor has in the property, and a court of equity will always permit the real owner to show that the apparent ownership of another is or was not real, and, when the judgment debtor has no other interest except the naked legal title, the lien of judgment does not attach. *Freeman on Judgments* (4th Ed.) § 357; *Black on Judgments* (2d Ed.) §§ 420, 421; *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386." *Iknoian v. Winter*, 94 Cal. App. 223, 225, 270 P. 999, 1000.

The order is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



4 Cal.App.2d 685

ARMACOST v. WILBERG et al.

Civ. 8494.

District Court of Appeal, Second District,
Division 1, California.

Feb. 21, 1935.

Rehearing Denied March 21, 1935.

Automobiles §181(1, 2)

Passenger in automobile held "guest" and required to prove gross negligence of driver to recover for injuries, notwithstanding that passenger did not solicit ride, but was asked to ride because driver did not wish to ride alone, or that passenger borrowed flash-light from driver with which to study while riding (St. 1929, p. 1580, § 141¼).

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Elizabeth Armacost against Esther Wilberg and another. From the judgments, the plaintiff appeals.

Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for respondents.

YORK, Justice.

This is an appeal by plaintiff from a judgment of nonsuit in favor of defendant Stevens, and from a judgment in favor of defendant Wilberg on a verdict given by the jury.

The action was one for damages for personal injuries arising out of an automobile accident. The plaintiff was riding in the car driven by defendant Wilberg, to whom the car was loaned by the daughter of defendant Stevens, at a time when section 141¼ of the California Vehicle Act (St. 1923, p. 517, as added in 1929, St. 1929, p. 1580, Deering's Gen. Laws Supp. 1929, Act 5128) was in effect.

A motion for nonsuit was granted as to the defendant Stevens after the testimony showed without contradiction that defendant Stevens, long before the accident, had given the automobile involved in the accident to his daughter, who was not a party to the action. The car had always been registered in the daughter's name, and it is undisputed that defendant Stevens had given it to her at the time it was purchased.

There is nothing in the evidence which would justify the conclusion that the plaintiff was other than a guest riding with defendant Wilberg. The fact that she did not request a ride, or that she did not stop defendant on the street and request a ride, has nothing to do with the matter at all. The fact that the defendant Wilberg did not wish to ride alone, and for that reason asked the plaintiff to ride with her, does not in any way change the application of the rule of law as to a guest, as laid down by section 141¼ of the California Vehicle Act. The argument that the plaintiff was not a guest because she had received compensation, in that she had borrowed from defendant Wilberg a flash-light with which to study while riding to Los Angeles, and that she did not solicit a ride, does not prove or tend to prove that plaintiff was other than a guest of defendant Wilberg.

The refusal of instructions based upon any other hypothesis than that the driver must be found guilty of gross negligence in order that the plaintiff might recover was proper, in view of the fact, fully established as a necessary result of the evidence, that the plaintiff was riding as a guest of defendant Wilberg.

No authority is cited by appellant, nor can we find any, that holds that the instruction that the rate of speed allowed by law to an automobile approaching an intersection on a boulevard, under the conditions shown herein, is forty miles per hour, is erroneous.

The judgments appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

On Petition for Rehearing.

PER CURIAM.

The petition for rehearing is denied. For definition of "gross negligence," and ruling as to circumstances under which the question is for the jury to determine, see Cooper v. Kellogg, 42 P.(2d) 59.



5 Cal.App.2d 185

BADIN v. GAUGH et al.

WOHLBERG v. SAME.

Civ. 9393, 9394.

District Court of Appeal, Second District,
Division 2, California.
March 8, 1935.

1. Appeal and error ☞1010(1)

Appellate court may not set aside trial court's finding for want of evidence except when there is no evidence to support finding, or where supporting evidence is so slight as to show abuse of discretion.

2. Appeal and error ☞931(1)

Appellate court must view evidence in light most favorable to a support of the judgment.

3. Automobiles ☞244(26)

Evidence held sufficient to support finding that driver of defendant's automobile, at time and place of accident, was driving and operating automobile with permission of defendant owner so as, under the statute, to render owner liable for driver's negligence (Civ. Code, § 1714½).

Appeals from Superior Court, Los Angeles County; J. T. B. Warne and Carl A. Stutsman, Judges.

Actions by Katharine Badin and by William Wohlberg against Charles L. Gaugh and

Joseph S. Wynn, doing business under the fictitious firm name and style of the Wynn Chevrolet Company, and others. From adverse judgments, second named defendant appeals.

Affirmed.

Joe Crider, Jr., of Los Angeles, for appellant.

Le Roy Anderson, of Los Angeles, for respondents.

WILLIS, Justice pro tem.

There are two appeals herein, consolidated by stipulation, and the sole question concerns the liability of appellant Joseph S. Wynn for the injuries resulting to respondents, caused by the established negligence of defendant Charles L. Gaugh in the operation of an automobile of which appellant was owner.

The claim of liability is founded on the provisions of section 1714½ of the Civil Code, and is limited to the proposition that defendant Gaugh, at the time and place of the accident, was driving and operating appellant's automobile with the permission, express or implied, of appellant. The trial court found, in each case, that Gaugh, at the time and place of accident, was driving and operating the automobile with the permission of the owner, appellant herein. This finding is attacked by appellant, who claims it is not supported by the evidence.

[1-3] If there is substantial support for such finding this court cannot disturb it. An appellate court can rightfully set aside a finding for want of evidence only when there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion. *Reay v. Butler*, 95 Cal. 206, 214, 30 P. 208. The supporting evidence herein consists in admissions of appellant that he had given Gaugh permission to use the car on Sundays. The accident happened on Sunday evening, some seven hours after Gaugh quit work for the day. Against this evidence, appellant adduced testimony to the effect that the only permission he ever gave to Gaugh to use or operate the automobile was limited to driving it back and forth from appellant's place of business to Gaugh's place of residence, Gaugh being in his employ. This created a conflict on the question of whether the permission was broad enough to include the drive in question, or was limited to driving back and forth from home to work before and after work hours. The solution of this conflict required a consideration of the ele-

ment of credibility of witnesses and depended on a determination by the trial judge as to where credence was to be lodged. We cannot say that the evidence in support of the finding attacked was so slight as to show abuse of discretion on the part of the trial court. It is claimed by respondents to possess a real and substantial quality. We must view the evidence in the light most favorable to a support of the judgment. The trial judges, two in these cases, on the same evidence, each appraised the credibility of the witnesses and weighed the evidence, and the findings founded thereon have substantial basis. We are therefore not at liberty to disturb them.

These conclusions render it unnecessary to consider other points argued in the briefs.

The judgments are, and each of them is, affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 141

**HENRY v. HIBERNIA SAVINGS & LOAN
SOC. et al.**
Civ. 9595.

District Court of Appeal, First District,
Division 2, California.

March 6, 1935.

Hearing Denied by Supreme Court
May 3, 1935.

1. Appeal and error ⇨1011(1)

In son's action against administratrix of his father's estate and bank in which son and his deceased mother had joint account to collect amount of joint account, trial court's finding on conflicting evidence that forming of joint account was not done with knowledge and consent of father, that son had not contributed to account at various times prior to opening of joint account, and that money was community property *held* conclusive.

2. Husband and wife ⇨259

Deposits up to 1927 into savings account which was opened in name of wife *held* community property where all deposits were made from joint earnings of husband and wife (Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1 [now Probate Code, § 201]).

3. Husband and wife ⇨259

Money deposited up to 1923 from joint earnings of husband and wife into wife's sav-

ings account with increase thereof represented by interest vested in husband, and such portion wife had no power to devise or give away (Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1 [now Probate Code, § 201]).

4. Husband and wife ⇨247

Money from joint earnings of husband and wife which was deposited in wife's account subsequent to 1923 statutory amendment providing that on death of spouse one-half of community property belongs to surviving spouse and other half is subject to testamentary disposition of decedent, but prior to 1927 amendment providing that respective interests of spouses in community property are equal under management of husband, *held* to vest in husband, subject to wife's testamentary disposition of one-half thereof, since amendments are not retroactive (Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1 [now Probate Code, § 201]; Civ. Code, § 161a, as added by St. 1927, p. 484; §§ 172, 172a).

5. Wills ⇨6

As respects disposition of money from joint earnings of husband and wife which was deposited prior to 1927, but subsequent to 1923 amendment, providing that on death of either spouse one-half of community property belongs to surviving spouse, and other half is subject to testamentary disposition of decedent, wife *held* entitled to dispose of one-half of such money by will, and hence such portion should be awarded to executor of her estate unless gift to her son to that extent was valid (Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1 [now Probate Code, § 201]; Civ. Code, § 161a, as added by St. 1927, p. 484; §§ 172, 172a).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by William R. Henry against the Hibernia Savings & Loan Society and another. From an adverse judgment, plaintiff appeals.

Affirmed in part and reversed in part for limited purpose of retrial of single issue.

Fletcher A. Cutler, of San Francisco, for appellant.

Hankins & Hankins, of San Francisco, for respondent Carrie H. Stuart, administratrix of the estate of Porter W. Henry, deceased.

NOURSE, Presiding Justice.

In 1899 a savings account was opened at the Hibernia Bank in the name of Annie Henry, which account was added to by both Mrs. Henry and her husband, P. W. Henry, for many years. On November 22, 1928, Annie

Henry, who was then over eighty-four and partially blind, and her son, the plaintiff herein, went to the bank and transferred the money in this account—then \$1,771.88—to a joint tenancy in the names of Annie Henry and William R. Henry. This was done without the knowledge or consent of P. W. Henry. On January 10, 1929, plaintiff deposited \$100 to this account and with accrued interest at the time of the trial the account was worth \$2,304.96. P. W. Henry and his wife also had \$12,000 in a joint tenancy account in a Burlingame bank. Mrs. Henry made her will not mentioning her husband among the legatees, and when she died on May 18, 1931, her son, the plaintiff, was appointed executor of her will. As such, he brought suit against P. W. Henry and others to recover the \$12,000 in the Burlingame bank and judgment went against him. P. W. Henry died a few months after his wife's death and his daughter, Carrie Stuart, was appointed his administratrix. Plaintiff started this action against the bank and the administratrix to collect the \$2,304.96 which was in the joint account of himself and his mother. The trial court found that the money was community property, with the exception of the \$100 deposited by plaintiff, and therefore part of the estate of P. W. Henry. Plaintiff appeals on the grounds that there is insufficient evidence to show that the money was community property, and that even if it were, all of the money should not go to the estate of P. W. Henry.

[1] Appellant contends that the forming of the joint account was done with the knowledge and consent of his father; that he had contributed to the money in the Hibernia Bank at various times prior to the opening of the joint account by giving his mother money with the understanding that she was acting as his banker; that the agreement between husband and wife was that all of the property should be hers as separate property; and that Mr. and Mrs. Henry joined in making Mrs. Henry's will. But respondents argue, and the trial court found, that these contentions were not based on fact. The only evidence concerning the consent and knowledge of the father was that he was in the dining room and Mrs. Henry and the plaintiff were in the kitchen when she made the statement that she was going to form the joint account. The evidence also shows that when P. W. Henry learned of the joint account he was very angry. In spite of the close relation and daily companionship of P. W. Henry and his wife and daughter, no mention was ever made of the fact that Annie Henry was acting as a

banker for her son, and it was shown that the father and daughter did not know of the joint account until about one month before Mrs. Henry's death. In answer to appellant's argument that P. W. Henry intended all of the property to be Mrs. Henry's separate property, respondents show that the \$12,000 account in the Burlingame bank was in joint tenancy between P. W. Henry and Mrs. Henry. And as to the will, the fact that the husband was not mentioned as a legatee and the fact that all of their property, real and personal, was disposed of seems to indicate that it was only intended to take effect in case the husband predeceased his wife. In all this we have a conflict of evidence which was resolved against plaintiff and that concludes the controversy here, particularly because the great preponderance of the evidence supports the findings.

[2-4] The only debatable question raised by appellant is whether the trial court was justified in awarding all the community property to the estate of the husband. The undisputed evidence shows that, aside from the \$100 deposit made by appellant and which was awarded to him, the entire account was deposited prior to February 10, 1927, and that \$500 thereof was deposited after the effective date of the amendment to section 1401 of the Civil Code in 1923 (St. 1923, p. 29, § 1), now section 201 of the Probate Code. All these deposits having been made from the joint earnings of the husband and wife, the trial court properly held the moneys to be community property. All that acquired prior to 1923, with the increase thereof represented by the interest paid by the bank, vested in the husband, and that portion the wife did not have power to devise or give away. *Riley v. Gordon*, 137 Cal. App. 311, 314, 30 P.(2d) 617. As to that portion acquired subsequent to 1923 but prior to the 1927 amendment to section 161a of the Civil Code (St. 1927, p. 484), it is clear that the title also vested in the husband (*McKay v. Lauriston*, 204 Cal. 557, 565, 269 P. 519), subject, however, to the wife's testamentary disposition of one-half thereof. These conclusions follow because the amendments of 1923 and 1927 have been held non-retroactive. *Trimble v. Trimble*, 219 Cal. 340, 343, 26 P.(2d) 477, and cases there cited.

To restate the foregoing—none of the community property acquired prior to the 1923 amendment was subject to the testamentary disposition of the wife and the title to none of that acquired prior to the 1927 amendment was vested in her. Hence, when, in 1928, she attempted to make a gift of the entire fund

to the appellant, she assumed control over property in which she had no vested interest and in which she did not acquire title by operation of law as was the case in *Lynch v. Lynch*, 207 Cal. 582, 586, 279 P. 653.

The question of the right of a wife to make a gift of the community personal property during coverture without the husband's consent has not been determined in this state by any case cited to us, but all sound reason would deny the power. Numerous cases may be cited to the point that a gift of community property by the husband made without the wife's consent is voidable as to the wife's half. *Trimble v. Trimble*, 219 Cal. 340, 344, 26 P.(2d) 477; *Travelers' Ins. Co. v. Fancher*, 219 Cal. 351, 355, 26 P.(2d) 482; *Beemer v. Roher*, 137 Cal. App. 298, 30 P.(2d) 549. All the cases ruling on the point seem to treat the expression "testamentary disposition" found in section 201 of the Probate Code as including gifts inter vivos, and none distinguishes between the language of section 172 of the Civil Code relating to community personal property and the language of section 172a of the same Code relating to community real property.

[5] We are reluctant to make a decision on the rights of the wife to dispose of the community personal property because of the manner in which the point is presented on this appeal. The question of her right to dispose of any part of the community property by gift or will was not put in issue before the trial court. The appellant's whole case was tried on the theory that the fund was the separate property of the wife and that no community interest was involved. In his opening brief the appellant states as the last of six questions involved the following: "6. The trial Court finding the money to be community property may it award the whole thereof to the surviving husband, thereby depriving the wife of her community interest in it?"

In that brief he devotes a single paragraph to this question in which he argues that, under the rule of *Beemer v. Roher*, supra, "the wife was entitled to one-half of the community property" and that the trial court therefore erred in awarding the whole to the estate of P. W. Henry. In his final brief he argues the point at some length, but upon a statement of facts which we cannot reconcile with the record. Upon the authorities above cited, it must be evident that the wife had no power of disposition, either by will or gift, of that portion of the fund acquired before the

amendment of 1923, including the profits thereof. This would limit the question presented to the sum of \$500, with the interest thereon, acquired after that date. With the fund thus limited, we are in accord with appellant's argument that Mrs. Henry was entitled to dispose of one-half of that sum by will and that such portion of the fund should be awarded to the executor of her estate unless the gift to appellant is to that extent valid. But we are confronted with the peculiar situation that we are asked as an appellate court to rule upon an issue that was never suggested at the trial, and one involving the rights of the executor who was not made a party to the litigation.

For these reasons, the judgment should be reversed for the limited purpose of a retrial of the single issue of the disposition of that portion of the community fund deposited after August 16, 1923, with the interest thereon, but in all other respects the judgment should be affirmed, with costs to respondent. So ordered.

We concur: STURTEVANT, J.; SPENCE, J.



5 Cal.App.2d 64

MITCHELL v. BOARD OF TRUSTEES OF
VISALIA UNION HIGH SCHOOL
DIST. et al.
Civ. 1333.

District Court of Appeal, Fourth District,
California.
March 1, 1935.

1. Schools and school districts ⇨139

Board of education had no power to accept teacher's resignation as of June 10, 1933, where resignation was dated and delivered May 10, 1932, and accepted May 23, 1932, since under statute effective date of resignation must not be later than close of school year during which resignation is received (School Code, § 5.640).

2. Schools and school districts ⇨133

Teacher who served probationary period of three full years, and who was re-elected, and who received no notice of dismissal, acquired permanent status (School Code, § 5.681).

3. Schools and school districts ☞139

High school teacher's resignation, which was coercively exacted by board of education for purpose of preventing teacher from acquiring permanent status, *held void* (School Code, §§ 5.640, 5.681).

4. Schools and school districts ☞141(1)

Teacher in acquiring permanent status does not thereby acquire vested right to teach any certain class or in any certain school, and board of education has power to reasonably change assignments so long as work assigned is of rank and grade equivalent to that by which permanent status was acquired, and so long as assignment is one for which teacher is qualified (School Code, § 5.640).

5. Schools and school districts ☞139

Teacher who acquired permanent status in high school while teaching commercial subjects, and whose resignation had been coercively exacted, *held* entitled to reinstatement as permanent teacher, but board of education could not be compelled to assign teacher to commercial subjects only (School Code, § 5.640).

6. Schools and school districts ☞144(3)

Teacher who acquired permanent status, and who was wrongfully discharged, *held* entitled to salary paid for preceding year, where it appeared that no salary cuts were made by board of education for other teachers (School Code, §§ 5.640, 5.681).

7. Schools and school districts ☞141(6)

Word "positions," within statute providing for permanent status as teacher upon election after employment for three consecutive school years in a position or positions, gave teacher who acquired permanent status no additional right so as to entitle him to reinstatement as part-time teacher in evening high school (School Code, § 5.500, repealed and re-enacted by St. 1931, p. 1394, § 4).

[Ed. Note.—For other definitions of "Position," see Words & Phrases.]

8. Schools and school districts ☞133

While teacher's permanent status may be acquired through service in one or more positions, status when acquired cannot apply to anything in excess of regular and ordinary full-time employment of teacher, since tenure laws were not intended to cover extra work which goes beyond usual full-time employment (School Code, § 5.500, repealed and re-enacted by St. 1931, p. 1394, § 4).

9. Schools and school districts ☞133

Purpose of statute providing for teacher's permanent status upon election after employment for three consecutive school years is to give security in employment and to prevent dismissal of teacher without cause, and

not to give vested interest in certain classes, certain hours, or certain salary (School Code, § 5.500, repealed and re-enacted by St. 1931, p. 1394, § 4).

10. Schools and school districts ☞141(6)

Teacher who acquired permanent status while teaching commercial subjects in day high school and teaching accounting in evening high school for additional compensation, and who was wrongfully discharged, *held* not entitled to reinstatement as teacher of accounting in evening high school, since discontinuance of additional employment did not violate statutory requirement that teacher having permanent status shall not be arbitrarily dismissed (School Code, § 5.500, repealed and re-enacted by St. 1931, p. 1394, § 4; §§ 5.640, 5.681).

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Application for writ of mandate by Karl W. Mitchell against the Board of Trustees of Visalia Union High School District and others. From a judgment, respondents appeal.

Modified in part, and as modified affirmed, and reversed in part.

Walter C. Haight and Leroy McCormick, both of Visalia, for appellants.

W. R. Bailey, of Visalia, for respondent.

BARNARD, Presiding Justice.

The Visalia High School District operates a school known as the Visalia Union High School and Junior College and also operates an evening high school. The petitioner was employed by the respondent district as a teacher and taught commercial subjects in the first named school for seven consecutive years, ending with the school year 1932-1933. During most of this time he received \$2,700 a year for such services, but during the year 1932-1933 he was paid \$2,500 in accordance with a uniform cut imposed that year upon all teachers in the school. During the same seven years he also taught a class in accounting in the evening high school for four hours per week, receiving therefor \$1.75 per hour. In May, 1933, the petitioner was informed that his services were no longer required, and when he presented himself at the beginning of the next school year he was informed that he would not be permitted to teach. No contention is here made that any particular kind of service in the district had been discontinued or that there had been any decrease in attendance.

The petitioner applied for a writ of mandate, setting forth two causes of action in his petition. The first of these related to his employment in the high school and junior college and the second to his employment in the evening high school. The prayer was for an order restoring and reinstating him to his position and employment as a permanent teacher of commercial subjects in the high school and junior college and for a further order restoring and reinstating him as a permanent teacher of accounting in the evening high school. The court found in his favor and entered a judgment ordering a peremptory writ of mandate to issue requiring the respondents to restore and reinstate the petitioner to his position as permanent teacher of commercial subjects in the high school and junior college and to his position as permanent teacher of accounting in the evening high school, and further requiring them to pay his accrued salary and accrued compensation in the two positions. From this judgment the respondents have appealed.

The first point raised is that a finding to the effect that a purported resignation signed by the petitioner on May 16, 1932, was the result of menace, was involuntary, and was coercively exacted from the petitioner, is not supported by the evidence and is contrary to law. An understanding of this point requires a statement of certain additional facts. It appears from the evidence and the findings that for some years the respondent board had pursued the practice each year of taking and accepting resignations from such teachers as would otherwise be entitled to a permanent status, the said resignations being so worded as to become effective at the close of the next succeeding school year, and the same being required as a condition of such teachers being retained for the following year. In pursuance of this plan, on May 16, 1932, the petitioner was asked to sign and did sign such a resignation as of that date but to become effective on June 10, 1933. Similar resignations were secured at that time from twenty teachers in said high school, and on May 23, 1932, the respondent board adopted a resolution purporting to accept all of said resignations to take effect on June 10, 1933. On May 10, 1933, the petitioner was notified that his said resignation had been accepted and that his services would not be required after the close of that school year.

[1-3] It may first be observed that the respondent board had no power to accept this resignation as of June 10, 1933. *Aldrich v. Chino School District*, 109 Cal. App. 14, 15,

292 P. 271. It was dated and delivered on May 10, 1932, and accepted on May 23, 1932, and section 5.640 of the School Code provides that such a board shall have power to accept the resignation of any employee and affix the date when such resignation shall take effect, provided that such effective date shall not be later than the close of the school year during which such resignation shall have been received. A further and more important consideration is that these resignations were required and accepted as a mere subterfuge in an obvious attempt to evade the tenure provisions of the statutes. The president of the respondent board testified frankly that the resignations were taken for this purpose and with the object of preventing teachers from acquiring a permanent status. The petitioner had served the probationary period of three full years and no notice of dismissal was given in accordance with section 5.681 of the School Code. On the contrary, he was re-elected, and under the plain provisions of the statute he acquired status as a permanent teacher. *La Shells v. Hench*, 98 Cal. App. 6, 276 P. 377; *Grigsby v. King*, 202 Cal. 299, 260 P. 789; *Owens v. Board of Education*, 68 Cal. App. 403, 229 P. 881; *Chambers v. Davis*, 131 Cal. App. 500, 22 P.(2d) 27. Not only was this purported resignation an involuntary one which was coercively exacted from the petitioner, but such an admitted attempt to evade and circumvent the law could not be upheld in any event, and without further analysis or citation of law, it may be said that the trial court was correct in holding the same void and ineffective.

While that part of the judgment appealed from which orders the petitioner reinstated as a permanent teacher in respondent district was correct in general, we think it went too far in one respect. The order was to restore the petitioner "to his position and employment as a permanent teacher of commercial subjects in the Visalia Union High School and Junior College." In *Cullen v. Board of Education*, 126 Cal. App. 510, 15 P.(2d) 227, 228, 16 P.(2d) 272, the court said: "But we should not be understood as holding that this right of tenure guarantees that a teacher must be retained in any particular school or assigned to teach any particular class or classes. This right of tenure is a right which the teacher enjoys to continue in the position or positions to which he has become elected under the statute—i. e., in a position or positions of a rank and grade equivalent to that occupied for the probationary period and to which the teacher has thus become 'elected' under the statute."

[4, 5] There is nothing in the tenure law which interferes with the general power and right of a board of education to assign teachers to particular classes and to particular schools in accordance with its judgment and desire reasonably exercised. A teacher, in acquiring a permanent status, does not thereby acquire a vested right to teach any certain class or in any certain school. While a board would have no right to evade the plain meaning of the tenure act by assigning a teacher to a class of work for which he was not qualified, for the purpose of compelling his resignation, it has the power to reasonably change assignments with respect to a permanent teacher so long as the work assigned is of a rank and grade equivalent to that by which the permanent status was acquired and so long as the assignment is one for which the teacher in question is qualified. We think the order here in question should be so modified as to permit the respondent board to assign the petitioner to any class which he was qualified to teach and of a rank and grade similar to the work done by him during his probationary period, whether or not such a class is one in a commercial subject.

[6] It is next urged that the court erred in holding that the salary paid the petitioner for the preceding year should prevail for the year 1933-1934. It fully appears that no general salary cuts were made by the board for the year 1933-1934 and that the other teachers were paid the same salary for that year as for the preceding year. Petitioner's employment continued by operation of law, and in the absence of any evidence of a change made by the board, it must be presumed that the salary continues the same. Under the circumstances which appear in the evidence the court was warranted in so holding.

[7] Finally, it is urged that the court erred in ordering that the petitioner be reinstated and permitted to teach accounting in the evening high school for four hours a week and that he should be paid an additional amount therefor. In effect, the petitioner seems to contend that he acquired one position as a teacher in the regular high school and another and different position through his work in the evening high school. In *Cullen v. Board of Education*, supra, the court was inclined to hold that teaching part of the time in a day school and part of the time in an evening school constituted but one position. In denying a hearing the Supreme Court withheld its approval of that proposition. It is unnecessary to decide that question here since this petitioner had, in any event, acquired perma-

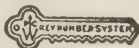
nent status as a full-time teacher in the day school. While section 5.500 of the School Code (repealed and re-enacted by St. 1931, p. 1394, § 4) provides for permanent status upon election after employment for three consecutive school years "in a position, or positions," we cannot see that including the plural in this provision is of any importance where a permanent status as a full-time teacher has been acquired through teaching in one position in one kind of school. Having thus acquired a permanent status, a teacher may not be dismissed except in certain cases, with which we are not here concerned.

[8-10] While a permanent status may be acquired through service in one or more positions, we think the status when acquired cannot apply or relate to anything in excess of the regular and ordinary full-time employment of a teacher. We take it that these tenure laws, at most, give to a teacher a right to continue in full-time employment without arbitrary dismissal, and that they were not intended to apply to or cover any extra work which goes beyond the usual full-time employment. The purpose of the act is to give security in employment and to prevent dismissal without cause, and not to give a vested interest in certain classes, certain hours, or even in a certain salary. The additional work done by this petitioner was in the nature of extra work for extra pay, and while it amounted to an increase in salary on condition of putting in extra time, it added nothing to his status as a permanent teacher under the tenure act. Any such additional work for additional pay does not come within the provisions of the act and any discontinuance thereof does not violate the essential provision that a teacher having a permanent status shall not be arbitrarily dismissed. For these reasons, we think the court erred in that part of its judgment which provided that the petitioner should be reinstated in so far as teaching a class in accounting in the evening high school in this district at an additional compensation.

That part of the judgment ordering the respondents "to immediately reinstate and restore said petitioner to his position and employment as a permanent teacher of commercial subjects of the Visalia Union High School District in the Visalia High School and Junior College" is modified by striking therefrom the words "of commercial subjects" and, as so modified, is affirmed; that part of the judgment ordering the respondents to pay to the petitioner the accrued and overdue payments on his salary as a permanent teacher is

affirmed; and that part of said judgment ordering the respondents to reinstate and restore the petitioner to his position and employment as a permanent teacher of accounting in the evening high school and to compensate him therefor is reversed. Each party shall pay his own costs.

We concur: MARKS, J.; JENNINGS, J.



**MARKET STREET RY. CO. v. INDUSTRIAL
ACCIDENT COMMISSION et al.***

Civ. 9691.

District Court of Appeal, First District,
Division 2, California.

March 12, 1935.

Hearing Granted by Supreme Court
May 8, 1935.

1. Limitation of actions ☞124

Under general law, except by successor in interest, there can be no amendment changing parties to action after statute of limitations has run.

2. Master and servant ☞398

Dependent child's claim under Compensation Act for unexpired portion of death benefits awarded mother for father's death held barred by one-year statute of limitations, where mother in original claim had not mentioned child, and, prior to child's filing of application upon mother's death three years after father's, child had been neither constructively nor otherwise a party to compensation proceeding (Gen. Laws 1931, Act 4749, §§ 14, 20 (d), 24).

Frank Henry Hopkins and another petitioned the Industrial Accident Commission for the unexpired balance of an award, payable by the Market Street Railway Company, for the death of Alfred E. Hopkins. The Industrial Accident Commission made an award for petitioners, and the Market Street Railway Company petitions for a writ of review and an order annulling the award.

Award annulled.

Wm. M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

STURTEVANT, Justice.

The petitioner asks for a writ of review and an order annulling an award of a death benefit. Heretofore the petitioner was a corporation conducting a street railway system in San Francisco, and under authority duly obtained it was self-insured. On July 24, 1930, Alfred E. Hopkins, while employed by the petitioner and in the course of and arising out of his employment, suffered an injury from which he died on the same day. He left surviving him his wife, Minnie Hopkins. On the 30th of July, 1930, she applied for a death benefit. In due course her application was granted, and the respondent commission made an award. One of the findings was: "The employee left surviving him, wholly dependent, Minnie Hopkins, his wife, who is entitled to a death benefit of \$4,695.00, payable at the rate of \$19.56 a week, together with an award for \$150.00 burial expense payable directly to Minnie Hopkins, the applicant. Said payments are based upon earnings of \$5.76 a day for employment five and a half days a week." Neither prior to the date of said award nor before June 27, 1934, did any of the children appear in, nor were they mentioned in, the record. Thereafter, on July 12, 1933, Minnie Hopkins died. Soon after her death the children came forward. Frank Henry Hopkins filed a petition in his own behalf, and Helen M. Michael, his sister, also filed a petition in his behalf, and therein she asked for other relief.

[1, 2] The petitioner answered the petitions of said claimants, and objected at all times to the hearing thereof. Nevertheless, on the 22d of August, 1934, the respondent commission filed an "order altering and amending findings and award for good cause, reassigning death benefit and directing payment of certain accrued and unpaid death benefit." The material portion thereof is as follows: "2. The employee left surviving him, wholly dependent, Minnie Hopkins, his widow, and Frank Henry Hopkins, his adult child who was mentally incapacitated from earning, who together became entitled to a death benefit of \$4,695 payable at the rate of \$19.56 a week, together with an award of \$150 for burial expense payable directly to said widow. The payments are based upon earnings of \$5.76 a day for employment 5½ days a week."

At this time the petitioner objects to the amended award and the whole thereof as being in excess of the jurisdiction of the respondent commission. The amended award

was made more than four years after the death of the employee. It will be noted that it purports as of its date to so amend the original award as to include Frank Henry Hopkins as one who is wholly dependent. By the express provisions of the statute (2 Deering's Gen. Laws, Act 4749, p. 2272, § 24), no claim for compensation is assignable before payment. Neither does such claim survive if there be no dependent. Section 14. Under the general law in this state, except by a successor in interest, there can be no amendment changing the parties after the statute of limitations has run. *Dubbers v. Goux*, 51 Cal. 153; *Merced Bank v. Price*, 9 Cal. App. 177, 189, 98 P. 383; *John Bollman Co. v. S. Bachman & Co.*, 16 Cal. App. 589, 117 P. 690, 122 P. 835; *Altpeter v. Postal Telegraph-Cable Co.*, 26 Cal. App. 705, 708, 148 P. 241. The question then arises whether the said statute changes that rule in so far as the facts in the instant case are concerned. The petitioner asserts the respondent commission had no such power at the time the order was made and it cites *Jones v. Industrial Acc. Comm.*, 85 Cal. App. 201, 259 P. 73. The decision is directly in point and sustains the contention. The respondent commission cites *Great W. P. Co. v. Industrial Acc. Comm.*, 196 Cal. 593, 602, 238 P. 662, as holding otherwise. We think it does not do so. The pertinent facts of that case, as stated by Mr. Chief Justice Waste (pages 600, 601 of 196 Cal., 238 P. 662, 665), were as follows: "William W. Savercool the grandfather, was not originally a party claimant in the proceeding before the commission. The original application for compensation for the death of the employee was filed December 28, 1920, by James and Lillian Savercool, father and mother of the decedent. Among the other allegations it was therein stated that 'Wm. W. Savercool, grandfather, aged 73,' was one of the dependents; the others being the father and mother, and nine brothers and sisters under 18 years of age. After proceedings had, an award made and set aside, the matter came on for rehearing on June 29, 1922. At that time applicant, James Savercool, requested that William W. Savercool, the grandfather, be joined as a party applicant in the proceeding. Over the objections of petitioner, first, that the request 'came late,' and second, that the grandfather 'was not a member of the household,' the order was made. William W. Savercool was not present at the hearing; no appearance was made for him, other than a waiver of notice and a consent that the hearing proceed, which was entered by the applicant, James Savercool. Thereafter the Commis-

sion made its first award, in which it held that the application of the grandfather was barred because not presented in time. When that award was annulled, and the proceedings remanded, the petitioner objected to the inclusion of the grandfather in the action on the ground that he had never requested any relief in the premises. Thereupon, apparently at the behest of the commission, William W. Savercool filed written appearance, and requested that an award be entered in his favor for such amount as he should be entitled to 'by reason of the circumstances involved in this matter.' Formal objection to the grandfather being included in the proceedings was made by petitioner, and, we may assume, overruled, for subsequently the respondent made new findings, in which it decided that the claim of the grandfather was filed within time."

As to the belated filing of a formal application by the grandfather the court said: "No order was made in the matter of bringing William W. Savercool into the proceeding as an applicant until more than 1½ years after the death of the employee. If he was not properly before the commission before that time, either actually or so constructively as to be subject to its jurisdiction, he was not brought in by either of his belated appearances." But, under the facts of that case, as from the beginning of the proceeding, "the grandfather was so constructively before the commission that it had jurisdiction to determine his right to claim compensation." Therefore on the point at issue, at page 602 of 196 Cal., 238 P. 662, 666, the court stated its ruling as follows: "Going one step further, we see no reason why the Legislature may not have intended to provide, in the proviso to section 11 (a), that, when a claim for any portion of the benefits prescribed by the act has reached the point where it is necessary or expedient to submit the matter to the decision of the Industrial Accident Commission, the whole subject-matter of the controversy, including the further claims of the applicant, or of any and all other persons, should be thereby submitted to the jurisdiction of the commission for a complete determination, provided, of course, that all claims relating to the transaction be presented within the life of the continuing jurisdiction of the commission. That, we conclude, was the legislative intent, and the effect of the proviso added to section 11 (a). From this conclusion it results that the respondent did not exceed its jurisdiction in adding William W. Savercool as a party claimant in the proceeding."

In the instant case prior to June 20, 1934, Frank Henry Hopkins was neither constructively nor otherwise a party to the proceeding. The filing on that date of his application did not operate to make him a party. The respondent commission also relies on subdivision (d) of section 20, which provides a continuing jurisdiction. That section is pertinent when jurisdiction has once attached. However, Frank Henry Hopkins did not submit to the jurisdiction of the respondent commission until he filed his petition; therefore no question of continuing jurisdiction was involved. If no award had been made in favor of the mother, it is settled law that the respondent commission would have no authority, at a date more than one year after the death of the employee, to entertain Frank's claim for a death benefit. *Marsh v. Industrial Acc. Commission*, 217 Cal. 338, 352, 18 P.(2d) 933, 86 A. L. R. 563. Having failed to file an application within the year, the son was barred by the statute of limitations, and had no right to file one thereafter.

The award dated August 22, 1934, is annulled.

We concur: NOURSE, P. J.; SPENCE, J.

2 Cal.2d 625

OSTER v. STATE BAR OF CALIFORNIA.*

L. A. 14921.

Supreme Court of California.

March 21, 1935.

As Modified on Denial of Rehearing

April 18, 1935.

Attorney and client ☞58

Where parties agreed that attorney, if unable to obtain bail bond for client, would refund money received from third person to pay premium, attorney, by refunding only part thereof and retaining remainder as fee without third person's consent, committed act involving "moral turpitude" within statute, justifying six months' suspension (Code Civ. Proc. § 287, subd. 5).

[Ed. Note.—For other definitions of "Moral Turpitude," see Words & Phrases.]

In Bank.

Petition by Alexander L. Oster to review and annul a recommendation of the Board of Governors of the State Bar of California as to the suspension of petitioner from the practice of law.

Petitioner suspended from the practice of law for six months.

Alexander L. Oster, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a petition to review and annul the recommendation of the Board of Governors of the State Bar that the petitioner be suspended from the practice of law for a period of six months. Petitioner was charged by a notice to show cause, issued on December 6, 1933, with the commission, in the course of his relations as an attorney, of acts involving moral turpitude within the meaning of subdivision 5 of section 287 of the Code of Civil Procedure. The specific charge against petitioner was that out of the sum of \$500, intrusted to him for the express purpose of paying the premium on a bail bond that petitioner was seeking to secure for his client, he misappropriated the sum of \$200 for his own use and purposes. It is clearly shown by the record, and in fact it is not denied by petitioner, that a check for \$500 was turned over to him to enable him to procure a bail bond for his client, one Carl Beatty, by E. V. Turner, a friend of Beatty's, a gambler who operated a gambling ship known as the "Monte Carlo"

lying off the coast of Long Beach. We are satisfied from the evidence that at the time the check for \$500 was turned over to him he had no agreement, written or oral, with Turner, whereby Turner agreed to pay any portion on his fee for services rendered by petitioner to Beatty. Notwithstanding this fact, petitioner, after an unsuccessful attempt to procure the bond for Beatty, returned \$300 to Turner with a letter stating that he was retaining \$200 as his fee for services. Upon complaint being made by Turner to the city attorney, petitioner, during a conference held between himself and Turner and a deputy of the city attorney's office, gave to Turner his check for \$200 which was postdated and which was subsequently dishonored by the bank upon presentation. Petitioner admits in his answer that this sum of \$200 has not been repaid. Petitioner's only explanation of his conduct before the local administrative committee which held the hearing was that there was some sort of obligation, which he was not at liberty to divulge, resting upon Turner to finance the appeal of Beatty from the judgment of conviction rendered against Beatty in the superior court, and that because of this obligation of Turner to Beatty, he felt justified in deducting the sum of \$200 as his fee from the sum of \$500 intrusted to him for the purpose of paying the premium on a bail bond for his client. Whatever may have been the obligation, if any, upon Turner to finance the appeal of Beatty, in the absence of an agreement between Turner and petitioner that Turner should pay petitioner for services rendered to Beatty, petitioner was wholly unjustified in retaining for his own use any portion of the money delivered to him for another purpose. As above stated, the sum of \$500 was turned over to petitioner for one purpose and one purpose only—to pay the premium on a bail bond for Beatty. The receipt for the \$500 given by petitioner to Turner expressly provided that: "Should bond not be obtained, the above sum will be returned." Petitioner's duty as an attorney at law required him to redeliver to Turner the entire sum of \$500 intact. In failing to do so, he violated his oath as an attorney, and was guilty of an act involving moral turpitude within the meaning of subdivision 5 of section 287 of the Code of Civil Procedure.

We are satisfied with the recommendation of the Board of Governors of the State Bar. It is ordered that the petitioner be suspended from the practice of the law in this state for a period of six months from and after thirty days after the filing of this order.

2 Cal.2d 628

GREENBERG v. DU BAIN REALTY CORPORATION et al.
L. A. 14015.

Supreme Court of California.

March 21, 1935.

As Amended April 4, 1935.

Rehearing Denied April 18, 1935.

1. Principal and agent ⇨148(4)

Under rule against unjust enrichment, contract may be rescinded, even as against innocent principal, because of agent's unauthorized misrepresentations, notwithstanding rescinder's notice of agent's lack of authority.

2. Vendor and purchaser ⇨107

Purchaser *held* entitled to rescind land contract because of fraudulent representations by vendor's agent, notwithstanding stipulation in contract limiting agent's authority.

3. Vendor and purchaser ⇨123

Where nonresident returned home shortly after executing land contract on which he made periodical payments until revisiting state eight years later, whereupon purchaser, after about three months' negotiations concerning noninstallation of improvements which purchaser believed from vendor's letters would be installed, gave rescission notice and tendered everything of value received, rescission action begun on following day *held* not barred by laches or limitations.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Joseph Greenberg against the Du Bain Realty Corporation and others. Judgment for defendants, and plaintiff appeals.

Reversed and remanded, with directions.

Prior opinion, 35 P.(2d) 579.

Benjamin Chipkin, of Los Angeles, for appellant.

Joseph Musgrove, Thomas H. Cannan, and Fred O. McGirr, all of Los Angeles, for respondents.

WASTE, Chief Justice.

Plaintiff bought two lots from defendant corporation Du Bain Realty Corporation through Stoll and Boyd, salesmen for the realty corporation, agent for Ambassador Park Syndicate, in 1923. According to his complaint, he did and performed everything

of him required to be done under and in pursuance of the terms of the agreement and contract for the purchase of the lots, and was not in default. He gave notice of rescission in February, 1932, and brought this action upon refusal of the defendants to restore his money. The trial court sustained a demurrer to the third amended complaint, and the District Court of Appeal affirmed the judgment entered thereon for defendants. It held that plaintiff's claim of fraudulent representations of the agent is not tenable, in view of a stipulation in the contract entered into limiting the agent's authority, under the doctrine of *Gridley v. Tilson*, 202 Cal. 748, 262 P. 322, and also that plaintiff's right to rescind was barred by laches and by the statute of limitations.

[1, 2] The case was taken over by this court in order to eliminate the language dealing with the *Gridley v. Tilson* rule, which is now limited, in view of the decisions of this court in *Speck v. Wylie*, 1 Cal.(2d) 625, 36 P.(2d) 618, 619, 95 A. L. R. 760, and *Lozier v. Janss Investment Co.*, 1 Cal.(2d) 666, 36 P.(2d) 620, which were handed down after the opinion in this case was filed by the District Court of Appeal. In these later cases the rule is now firmly established that a rescission of contract may be had against even an innocent principal because of unauthorized misrepresentations by his agent, even though the rescinding party had notice of the agent's lack of authority. In those decisions, we endeavored to, and believe we did, make it clear that the basis for our conclusion is the equitable rule against unjust enrichment. As stated by the author of the concurring opinion in the *Wylie* Case: "The rule proceeds upon the theory that an innocent principal so contracting may not be permitted to enrich himself by reason of his agent's fraud, and that any property received by such principal is held by him as a constructive trustee for the person defrauded." We are therefore of the view that the claim of plaintiff may be maintained.

[3] Plaintiff bought the lots in 1923, while in California. He paid something down on the purchase price, and began making periodical payments on the balance. Between October 8, 1923, and October 7, 1931, he paid in all the amount of \$3,372.56. Plaintiff lived in New York, and during the period of making his payments he wrote to defendants, asking them to install the improvements represented by them as part of the consideration for the purchase by him of the lots. The

replies of the defendants led plaintiff to believe they would do so, and he continued to make payments on the purchase price of the lots. Shortly after making the agreement for the purchase of the lots, plaintiff left California for his home in New York, and did not return to California until October, 1931. He thereupon inspected the property and found the promised improvements had not been made. After negotiations as to the cause of the failure to install the improvements set forth in the contracts and prospectus of the tract, the plaintiff, on February 9, 1932, in writing, notified defendants of the rescission by him of the contract of purchase, and tendered everything of value he had received in the transaction, together with a quitclaim deed of the property from himself to Ambassador Park Syndicate, owner of the tract, and demanded from defendants the total amount, \$3,372.56, paid by him. The defendants refused the tender, and declined to pay the money. This action was commenced on February 10, the day following the rescission.

In our estimation, the action was not barred either by laches or by the statute of limitations.

The judgment is therefore reversed. The cause is remanded to the trial court, with directions to overrule the demurrer, permit the defendants to answer, and proceed with the trial of the cause.

We concur: PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



2 Cal.2d 622

HILL v. STATE BAR OF CALIFORNIA.
S. F. 15240.

Supreme Court of California.
March 21, 1935.

Rehearing Denied April 18, 1935.

1. Attorney and client ☞58

Discipline of attorney is not merely punitive but is designed to protect public, courts, and legal profession, and either to reform offender or remove him from practice.

2. Attorney and client ☞58

Where attorney attributed misconduct to addiction to liquor, and contended that, after

voluntarily closing law office, he was discharged from state hospital as cured, suspension of three years from closing of office *held* proper.

WASTE, C. J., dissenting.

In Bank.

Petition by Charles A. Hill to review a recommendation of the Board of Governors of the State Bar of California that petitioner be disbarred.

Petitioner suspended from the practice of law for three years from November 20, 1932.

Charles A. Hill, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PRESTON, Justice.

In proceedings against petitioner before the State Bar of California, a local administrative committee recommended that he be suspended from practice of the law in this state for a period of three years. Thereafter the Board of Governors adopted the findings of the local committee but recommended that petitioner be disbarred. The cause is before us upon petitioner's application for review.

The charges of serious misconduct are not denied. The question is: What discipline should be imposed upon petitioner? He attributes each and every act of misconduct to the fact that from 1928 to 1932 he was addicted to the excessive use of intoxicating liquor to such an extent as to deprive him of his normal faculty of clear, honest reasoning. He states that, realizing the gravity of his problem, he voluntarily closed his law office in November, 1932, and has not since practiced; that in said month he was committed to the Stockton State Hospital as an inebriate and was discharged therefrom on June 14, 1933; that a permanent cure was effected; that he is now making every effort to rehabilitate himself and he pleads for leniency.

Petitioner was born in 1889 and admitted to the bar in 1916. From 1924 to 1932 he was attorney for and intrusted with the management of certain interests of the complaining witness, W. J. Whitney. In 1927 he was in financial difficulty and asked Mr. Whitney for a short-term loan of \$3,000, to be secured by second trust deed on his home, already encumbered with a \$4,750 first mortgage. Mr. Whitney acceded to the request. Petitioner failed to pay the note at maturity, whereupon Mr. Whitney granted him an extension of time to enable him to sell the property. Pe-

tioner thereafter asked for a release of said second trust deed, telling Mr. Whitney that the holder of the first mortgage was threatening foreclosure and that he could not make any deal on the property while it was so heavily encumbered. Mr. Whitney also granted this request, upon the understanding that petitioner would sell or else give him a new note and trust deed. Petitioner was still acting as attorney for Mr. Whitney, who had every confidence in him, and required no title search on the property. The Whitney reconveyance was recorded December 30, 1929. Petitioner later executed to Mr. Whitney another note for \$3,000 and paid \$150 interest, but never executed a deed of trust.

In January, 1930, he delivered to the son-in-law of the mortgage holder, in partial satisfaction of that encumbrance, a deed to the property. Petitioner claims that this deed was merely given to forestall foreclosure, upon the agreement that he would have eighteen months to find a buyer, or pay the mortgage and have reconveyance, during which period he might continue to occupy the premises at \$50 a month rental; that he occupied the place until November 1, 1932, when an appraisal showed it to be worth no more than the mortgage, whereupon he abandoned it. Petitioner claims that he did not profit from execution of the deed, but rather threw away the chance to occupy the premises rent free during the period of foreclosure proceedings. He states he did not explain to Mr. Whitney, because he did not want to trouble him. Mr. Whitney was then approaching his eightieth year, but apparently was possessed of a keen, alert mental capacity for business. In October, 1932, petitioner promised to execute another note to Mr. Whitney to prevent the running of the statute of limitations on the old one. He failed to do so until after these proceedings had been commenced and until after Mr. Whitney had been forced to file an action to preserve his rights, to wit, until October, 1933, when he delivered to Mr. Whitney a new note for \$4,278.26, which Mr. Whitney accepted without security upon petitioner's statement that the property was no longer worth the amount of the mortgage and he had no other security therefor.

The facts relative to a second charge against petitioner are as follows: During 1932 petitioner collected for Mr. Whitney the sum of \$615.41, disbursed \$349.20 for his account, and misappropriated the balance, \$266.21, a

portion of which he should have used to pay certain taxes on Whitney properties and as a result Mr. Whitney was compelled to pay a delinquency penalty of \$30.65. Petitioner likewise, during this period commingled the Whitney and other trust funds with his own, instead of depositing them in a trust account, a practice which subjected him to severe criticism of the state bar. After filing of the complaint herein, restoration was made to Mr. Whitney of the \$266.21 and \$30.65 items. Petitioner states that he had no intention of misappropriating said sum; that, in fact, he was robbed thereof during the time he was making the collections because he was in the midst of a protracted spree of heavy drinking. He further states that he could have included in his statement an item of \$500 for legal services to Mr. Whitney, in which event it would have shown a credit balance in his favor.

We are not impressed with petitioner's explanations; indeed, he does not himself press them with much vigor. The substance of his plea is that the misconduct occurred because he was in the grip of a vicious habit and that it was the fruitage of that habit, being contrary to his real nature; that as he is cured, there is no likelihood of further complaint if he is permitted to resume practice.

[1,2] We hope that these assertions are true. Discipline of an attorney is not merely punitive in character but is designed to protect the public, the courts, and the legal profession; in short, to reform the offender or else remove him from practice. *Marsh v. State Bar* (Cal. Sup.) 39 P.(2d) 403. If petitioner's reformation has already been effected, why deny him the opportunity to demonstrate this fact? At least we have faith that, now "clothed in his right mind," he will not stray from the path of rectitude.

It is therefore ordered that petitioner herein, Charles A. Hill, be and he is hereby suspended from the practice of law in this state for the period of three years from and after November 20, 1932, the date, the evidence shows, petitioner closed his office.

We concur: SEAWELL, J.; CURTIS, J.; LANGDON, J.

WASTE, Chief justice.

I dissent. The recommendation of the Board of Governors should prevail.

2 Cal.2d 614

WILCOX v. STATE BAR OF CALIFORNIA.

L. A. 14925.

Supreme Court of California.

March 21, 1935.

Attorney and client §53(2)

Evidence of attorney's failure to perform agreement with client, on settlement of damage case, to pay client's doctor bill, with result that doctor attached client's automobile, and evidence of use for his own purposes of moneys collected for clients, *held* to warrant disbarment.

In Bank.

Petition by A. S. Wilcox for writ of review for the annulment of a recommendation made by the State Bar of California for petitioner's disbarment from the practice of law.

Disbarment ordered.

Edward J. Cotter, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

SEAWELL, Justice.

Three separate notices to show cause why he should not be disciplined for alleged professional misconduct, based upon four specific charges, were issued and served upon the petitioner by the local administrative committee No. 2, returnable before the local administrative committee No. 9, the State Bar of California, for hearing and decision, from which it concluded that petitioner's acts as disclosed at said hearings involved moral turpitude and dishonesty on his part within the meaning of subdivision 5, § 287, Code of Civil Procedure, and thereupon recommended, on April 30, 1934, that petitioner be permanently disbarred from the practice of law and that his name be stricken from the roll of attorneys of the state of California. Said notices were served January 3, 1934, March 1, 1934, and April 3, 1934, respectively. The acts charged as professional misconduct are alleged to have been committed in the latter part of 1932 and in the early part of 1933. The Board of Bar Governors on May 18, 1934, upon proceedings had and taken by it and upon consideration of the findings, conclusion, and recommendation of said local administrative committee No. 9, consolidated said proceedings and approved and adopted the findings of fact of said local administrative committee and recommended to this court that

petitioner A. S. Wilcox be disbarred from the practice of the law in the state of California.

Petitioner now comes to this court on a petition for a writ of review, asking this court to disapprove of and annul by its order the recommendation made by said board that he be disbarred from the practice of the law in this state.

This is the second time petitioner has been before the State Bar on charges of professional misconduct. On July 21, 1931, he was suspended from the practice of the law for a period of one year on a charge of having converted the funds of a client to his own uses.

One of the charges preferred against him, L. A. 640, has to do with one Jennie Purnell, plaintiff in a personal injury action for the recovery of damages on account of injuries sustained in an automobile accident which occurred in 1931. On May 4, 1932, he was substituted as the attorney for said Jennie Purnell. His fee was to be one-third of any sum he might recover from the defendant, who was insured. He sought and obtained an offer of settlement with the insurance carrier in the sum of \$2,100. His client was not willing to accept said sum, but upon his advice and suggestion that she would secure \$1,500 net and that petitioner would take care of the doctor's, nurse, and hospital bills she consented to a settlement upon that basis. Petitioner agreed, beyond question, that all of said bills would be taken care of by him. He collected said \$2,100 and paid her \$1,500. The doctor's bill was \$195, the nurse's bill was \$100, and the hospital bill was \$29. Petitioner claims that when he made the agreement to pay said bills he understood that the doctor's bill would not exceed \$50 and the nurse's bill would not exceed that amount. The evidence is conflicting on this point, but there can be no doubt, inasmuch as petitioner was preparing the case for trial and had been negotiating a settlement, that he well knew the amount of the doctor's and nurse's and hospital bills. Petitioner had been attempting to have the doctor and others reduce their bills, and it came to Mrs. Purnell's ears that the doctor might file a suit against her. She had no doubt been quite severely injured in the accident and was preparing to make a trip to Canada. She became uneasy about a suit being filed against her and she consulted petitioner about the matter and he assured her that she should not worry as he would take care of the doctor's bills as well as others. Her testimony is explicit on the point that petitioner said that she was to have \$1,500

clear, and he would make his fee out of the amount left after the payment of said bills. Shortly after she arrived in Canada petitioner informed her by letter that the doctor had filed suit against her and that he would take care of the matter. She returned in about seven weeks and learned that her automobile had been attached. The case was set for trial on a day certain, and petitioner was notified of the trial day. Mrs. Purnell heard nothing from petitioner, who was detained in jail upon a charge of conspiracy to defraud in a bankruptcy proceeding. The day before the case was set for trial the plaintiff's attorney received a letter from petitioner's wife requesting him to consent to a postponement as her husband could not be present on the day of trial. No reason was assigned as to his inability to attend the trial, and, because of failure to state the reason of the inability of her husband to attend, the trial proceeded. Judgment went for plaintiff, and the automobile was purchased at execution sale by plaintiff. At about this time the charge against petitioner in the federal court was dismissed and he was released from custody. He took no steps to appeal the case which he could have done had he acted in the matter. He subsequently moved to set aside the judgment, but he did not assign as one of the grounds therefor the fact that he was in jail on trial day and therefore was unable to be present. His motion was denied, and the judgment became final. He assured Mrs. Purnell and her son, Roy Feeney, both before and after the sale that he would redeem the automobile and restore it to her. In a letter to the son, Roy Feeney, under date of July 8, 1932, petitioner wrote as follows: "Just as soon as this case is tried and the court makes its judgment the judgment will be immediately paid by me." This he failed to do. After some time had passed he paid the nurse \$50 and later \$25 in full of her demand. The hospital bill was not paid. He told Mrs. Purnell he had paid it. Mrs. Purnell brought an action against him for damages suffered by his negligence by reason of his failure to defend against the physician's suit and to carry out his agreements generally. She obtained a judgment against him in the sum of \$100, which remained unsatisfied at the time the bar actions herein were concluded.

For his services in transaction No. 640 petitioner received a fee of \$600 and paid out \$75 to the nurse. The hospital bill is still unpaid. Mrs. Purnell received \$1,500 in compensation for serious injuries sustained in the accident, lost her automobile, and holds an unsatisfied

judgment against petitioner for the sum of \$100 and costs.

Petitioner failed to appear before the committee and defend against the complaint designated L. A. 653. By this accusation it is alleged that Nathan Cohn employed him to collect \$17 owing to him by one Bettie Martz. His fee was on a 50 per cent. basis. Two dollars were collected, and petitioner advised his client that the debtor had offered to pay \$10 in cash in full settlement of the account. The offer was accepted, and said sum of \$10 was collected by petitioner, who admitted to his client that he had used the money and was then unable to pay it, but that he would remit very soon. Cohn made frequent demands upon him for his share of said collection, but petitioner did not account to Cohn for the same until after he became aware that Cohn had lodged a complaint against him with the State Bar. He then claimed that he had previously mailed Cohn's portion of the collection, \$5 in cash, to him in an unregistered letter. He also failed to attend this hearing. In fact, he attended but one hearing of the several charges in which he was under investigation.

The second complaint included under L. A. 653 presented the following facts: In May, 1933, petitioner was retained by one N. W. Weidenheimer to collect the sum of \$815.45 due him upon a promissory note executed by one Alvin K. Petersen. He was to receive for his services 50 per cent. of any amount which he might collect. Petersen made an offer to pay the sum of \$500 in full settlement of the indebtedness, which amount was accepted by Weidenheimer upon the advice of petitioner. The terms of settlement were that Petersen was to pay down \$175 and \$50 per month, with \$25 as the last payment until paid in full. Petitioner remitted one-half of said \$175 cash payment, and remitted one-half of the monthly installments until the full indebtedness remaining unpaid was \$250. Petersen offered to pay \$175 in full of the balance due. This offer was accepted, and Petersen paid to petitioner said \$175. He used this money for his own purposes, and did not inform his client of its receipt by him, but continued to pay Weidenheimer \$25 per month, as though the original agreement was still in effect. Two checks for monthly payments of \$25 each issued by petitioner to Weidenheimer were refused payment by the bank on which they were drawn on the grounds of insufficient funds in the account of petitioner. Weidenheimer thereupon learned of the unaccounted payment of \$175 made to petitioner, of which he had received

no part, and employed other counsel, who demanded all of the papers in the matter, none of which was delivered. A balance of some \$45 is still due from petitioner to his client on account of this transaction.

The last transaction upon which complaint is made is L. A. 672. George Karp and his wife employed petitioner to collect damages arising out of an automobile collision. Petitioner's fee was to be one-third of any sum collected by him without suit. The claim was settled for the sum of \$94. Petitioner contrived to have the check for settlement indorsed to himself, collected the money, and used it for his own purposes. He made many promises to pay his clients their share, \$62.66, and after much effort on their part he paid them \$20, and no more.

The foregoing concludes a summary of the substance of the charges made by the accusers upon which the committee and Board of Bar Governors recommend the disbarment of petitioner.

As above noted, petitioner failed to appear at any of said hearings held by the local administrative committee, except the first hearing had, but did appear before the Board of Bar Governors and made his defense before that body. In explanation of his failure to attend all of said committee hearings he testified that he had written to the local administrative committee, requesting a continuance until June as he was then engaged in teaching night school and was in need of the wage as a means of support of his wife and children. He claimed that many of his troubles were caused by mingling his client's funds with his personal funds. He testified that the refusal of the bank to pay the two \$25 checks to Weidenheimer was caused by the delivery to him of a check in the sum of \$200 issued by one Lassiter, and deposited by him on November 15, 1933, with the Bank of America at Fourth and Spring streets, Los Angeles, which was afterwards returned not paid for want of sufficient funds to the account of the drawer. He claims that the Weidenheimer checks were not presented promptly for payment and the shrinking of his account in the sum of \$200 left his account insufficient to meet the payment of said checks, as he had drawn on the balance of his deposit in payment of rent and other bills. The petitioner testified that he explained to the persons complaining against him in every instance, the perplexing situation in which he found himself and that he tried for many weeks to borrow the money to make good each amount, but was unable to do so. He found it necessary to give up his

law office and get a job of work. He finally found employment with the C W A teaching school two hours at night and working in the tax office (the official designation not appearing) in the daytime and made good the Weidenheimer checks not paid by reason of insufficient funds. That he had made a number of payments in an attempt to restore to his clients all the funds which he had improperly used, there is no doubt. His salary for teaching night school was \$22 per week.

Petitioner is now approximately thirty-five years of age and has a wife and two children. That he had experienced trying difficulties in his effort to support himself and family by the practice of the law very clearly appears from the record before us.

We feel quite certain that he advised Mrs. Purnell to settle her claim for \$2,100 and that he agreed with her that he would accept \$600 and pay the doctor's bill, the nurse's claim, and the hospital bill. We are equally sure from the evidence that there was good reason for him to believe that the doctor's charge was to be reduced, and that it would have been reduced had Mrs. Purnell been solely liable therefor rather than jointly with the insurance company. The testimony of the nurse and the doctor himself sufficiently indicates that there was reason for petitioner to believe that the doctor's bill was open for settlement for a sum much less than the amount allowed on the default judgment. But this circumstance did not relieve him of performing his full duty to Mrs. Purnell and protecting her from the damage which resulted by his failure to perform his part of the bargain.

We are not disposed to denounce petitioner as being an inherently dishonest man. Like too many others whose error we have been called upon to adjudge, he yielded to the grim economic distress which stalked his own household and made use of funds which should have been turned into the hands of his clients. It is written in such cases that to do so is a serious violation of an attorney's trust. Once before, it would seem, petitioner similarly misstepped. The particular facts of that case are not before us, and we have no knowledge as to the degree of moral turpitude they may have disclosed. The disbarment of an attorney, which means the denial of his right to practice law in this state, is a grave matter, as it places an indelible stain upon the name of the disbarred lawyer which affects him generally as a citizen. Once disbarred, experience teaches us that the barrier which is thereby raised becomes almost insuperable to reinstatement. Therefore, the court should

and does exercise much care in making an order of disbarment. We have examined this record in the light of all that has been said in the premises and conclude that "moral turpitude" as defined in bar matters embraces a number of the acts charged against petitioner which have been herein discussed.

Upon the case presented, there seems to be no alternative by which the acts of petitioner may be condoned.

It is therefore the order of the court that he be disbarred from the practice of law in all the courts of this state and that his name be stricken from the roll of attorneys of this state.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; CURTIS, J.; THOMPSON, J.



2 Cal.2d 540

**MASTRANGELO v. WEST SIDE UNION
HIGH SCHOOL DIST. OF MERCED
COUNTY et al.**

MASTRANGELO et ux. v. SAME.
Sac. 4757.

Supreme Court of California.
Feb. 28, 1935.

Rehearing Denied March 29, 1935.

1. Negligence ⇨136(1)

In negligence action, nonsuit should not be granted except when it clearly appears there is no material issue left for jury.

2. Trial ⇨142

Nonsuit should be granted only when, accepting full force of evidence adduced, together with every reasonable inference and presumption favorable to plaintiff and excluding all evidence in conflict therewith, it appears that plaintiff cannot recover.

3. Schools and school districts ⇨122

In action for injuries sustained by high school pupil from explosion in gunpowder experiment occurring when mixture containing a wrong ingredient was being ground in iron mortar contrary to instructions in text-book, school district's negligence held for jury under evidence.

Under evidence, it was for jury to determine whether school district was negli-

gent in failing to exercise reasonable care in providing and labeling dangerous materials to be used in chemical experiments, and in failing properly to instruct and supervise selection, compounding, and handling of dangerous ingredients used in manufacturing explosives.

4. Negligence ⇨121(1)

In negligence action, plaintiff has burden of making prima facie showing of defendant's negligence.

5. Schools and school districts ⇨122

High school pupil suing for injuries sustained in chemical experiment could not be nonsuited if prima facie establishing facts reasonably warranting inference that school district was negligent, or that teacher was under legal duty to warn and protect pupil against injury and failed to perform duty.

6. Negligence ⇨136(2, 26)

Ordinarily, negligence and contributory negligence are for jury.

7. Schools and school districts ⇨122

In view of evidence that 16 year old high school student, injured in explosion, was ignorant of danger of gunpowder experiments and that neither text-book nor teacher warned him against mixing ingredients in mortar, question whether pupil was contributorily negligent in mixing ingredients in mortar instead of pulverizing them separately on sheets of paper as directed by text-book held for jury.

8. Schools and school districts ⇨89

Experiment in introductory high school chemistry course, requiring students to make and ignite explosive, should be conducted under strictest personal attention and supervision of instructor, as respects liability of school district for explosion injuring student.

In Bank.

Appeal from Superior Court, Merced County; S. L. Strother, Judge.

Suits, consolidated for trial, by Elge Mastrangelo, a minor, by his guardian ad litem, P. A. Mastrangelo, and by P. A. Mastrangelo and wife against the West Side Union High School District of Merced County and the Board of Trustees of said district. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

Prior opinion, 29 P.(2d) 885.

Andrew R. Schottky and H. K. Landram, both of Merced, for appellants.

F. M. Ostrander, of Merced, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate District. Upon further consideration, we adopt the opinion of Mr. Justice Thompson as part of the opinion of this court. It reads as follows:

The plaintiffs have appealed from a nonsuit which was granted upon the completion of their evidence at the trial of suits for damages for personal injuries sustained as a result of alleged negligence.

The above-entitled causes were consolidated for the purpose of trial. The appeals in both cases are determined by the same facts and law. To avoid confusion reference will be made only to the first above-entitled cause. For convenience the defendants will be hereinafter referred to as the defendant.

The defendant Union High School District of Merced county is organized under the provisions of law. The course of instruction includes the teaching of elementary chemistry. For the purpose of teaching chemistry, a laboratory was provided with appropriate equipment, including chemical substances with which to perform the standard experiments prescribed by the text-books. Among the equipment of the laboratory which was provided by the school for that purpose was a sink, benches, a cabinet containing various ingredients used for experiments, and an iron mortar and pestle. The experiments were presumed to be supervised by the teacher of chemistry. Greer & Bennett's Elementary Chemistry was used as a text-book on that subject. Among the experiments which were required in that course was the compounding of certain explosives. This experiment was designated as No. 40. It described the process of making ordinary gunpowder. After a general recital of the component parts to be used for compounding solid explosives, and the effect of oxygen and heat upon them, the following instructions were given for performing the experiment:

"(a) Put a little sulphur on a sheet of paper on your desk. Powder it very thoroughly by using a dry bottle as a rolling pin. Describe the solid. Much of the success of the experiment depends on the thoroughness with which the substance is powdered.

"(b) On another piece of paper, put an equal bulk of wood charcoal. Powder it also. Describe the solid.

"(c) On a third piece of paper put twice as much potassium nitrate as you have sulphur. Pulverize this. Describe the solid.

"(d) Now mix the contents of papers used in (a) and (b) by pouring the powders back and forth from one paper to the other at least a dozen times. Thorough mixing is necessary to make this a successful explosive. Now, pour this mixture on the paper in (c) and mix these substances as you did the first ones. What is the color of the mixture now?

"(e) This mixture is composed of the same ingredients as gunpowder. Make a little heap of it on a stone table top, or a brick or an iron pan. Lay the Bunsen burner on its side so that the flame plays on the edge of the pile of powder. Stand back. What takes place? What odor do you notice? * * *

"From this experiment, we see that solids may explode. Solid substances will not generally explode, however, unless they are (1) in very finely powdered form, and (2) mixed with oxygen, air, or an oxygen compound which gives up its oxygen readily when heated.

"The oxygen compound commonly used in gunpowder is niter or saltpeter; its chemical name is potassium nitrate; its formula is KNO_3 ."

The plaintiff Elge Mastrangelo was a boy of good intelligence. He was sixteen years of age when the accident which is involved in this suit occurred. He had attained the grade of a junior in the high school. He was a member of the chemistry class and had just commenced his laboratory work in company with other students under the supervision of Mr. Williams, the chemistry teacher. Various ingredients used for performing the required experiments, such as charcoal, sulphur, potassium nitrate, and potassium chlorate were kept in the laboratory in a cabinet or on a shelf in small pasteboard boxes. The plaintiff, in company with two other students, had twice previously performed the gunpowder experiment. In the laboratory, under the supervision of the chemistry teacher, on October 27, 1930, Elge was attempting to repeat the same experiment for the third time. Instead of pulverizing the ingredients upon separate sheets of paper as directed by the text-book, they were mixed together and ground in an iron mortar by means of a pestle. Instead of using potassium nitrate as directed by the text-book, either by mistake or otherwise, potassium chlorate was substituted therefor, or both substances were used. Both of these ingredients were kept in similar separate boxes on the shelf directly in front of the bench where the students were performing the experiment. While the plaintiff was mixing the ingredients, an explosion occurred which blew

off his left hand and seriously injured his right hand. His right eye was completely destroyed, and his left eye was injured. He is now scarcely able to read or see. He was compelled to procure a glass eye to replace his destroyed right eye. His injuries are serious and permanent.

Suit for damages for personal injuries sustained as a result of alleged negligence in failing to properly instruct or supervise the performance of highly dangerous experiments on the part of the students, was commenced. Upon trial of the cause before a jury, at the close of the testimony which was adduced on behalf of the plaintiffs, a nonsuit was granted. From this nonsuit, the plaintiffs have appealed. They contend the record discloses ample evidence of negligence proximately causing the accident, which required the submission of the facts to the jury.

We are of the opinion the evidence is adequate to have required the submission of the cause to the jury for its determination of the facts, and that the nonsuit was therefore erroneously granted.

[1, 2] The theory of the law is that a complainant has a right to have every material issue of fact, arising in a suit based upon negligence, determined by the jury. A motion for nonsuit should not be granted except when it clearly appears there is no material issue left for the decision of the jury. A nonsuit should be granted only when, accepting the full force of the evidence adduced, together with every reasonable inference favorable to the plaintiff, which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the plaintiff from recovering a judgment under such circumstances. A multitude of authorities has uniformly held the following principles to apply to a motion for nonsuit. The evidence must be construed most strongly against the defendant. Every favorable inference and presumption which may be fairly deduced from the evidence should be resolved in favor of the plaintiff. The plaintiff's evidence must ordinarily be accepted as true, and evidence which is contradictory thereof should be disregarded. Upon a motion for nonsuit the credibility of witnesses is ordinarily not involved. 9 Cal. Jur., p. 551, § 35.

[3] Applying the foregoing rules to the record in the present case, it may be reasonably inferred there is substantial evidence to indicate that the defendant was guilty of negligence in failing to exercise reasonable care in providing and labeling dangerous materials to be used in chemical experiments, and in

failing to properly instruct and supervise the selection, compounding, and handling of dangerous ingredients used in manufacturing explosives. It is not unreasonable to assume that it is the duty of a teacher of chemistry, in the exercise of ordinary care, to instruct students regarding the selection, mingling, and use of ingredients with which dangerous experiments are to be accomplished, rather than to merely hand them a text-book with general instructions to follow the text. This would seem to be particularly true when young and inexperienced students are expected to select from similar containers a proper harmless substance rather than another dangerous one which is very similar in appearance. It is the province of the jury to determine whether the mixing of the ingredients which were used to compound gunpowder in a mortar by means of a pestle, increase the danger of an explosion; whether the plaintiff was without previous knowledge or instruction regarding that danger, and whether that process was knowingly permitted to be followed by the pupil without warning from the teacher. It may also be a proper question for the determination of the jury as to whether the delivery of a text-book to an inexperienced pupil with mere instructions to follow the text, in the performance of a dangerous experiment in chemistry, is a sufficient exercise of care. In other words, if the jury should find that it was highly dangerous to mix together potassium chlorate, charcoal, and sulphur in an iron mortar by means of a pestle, it would become a further question of fact for the jury to determine whether the teacher was negligent in failing to warn the pupil of that danger, particularly if he observed the boy following that method and knew that he was inexperienced in that science.

[4-7] It is true that the burden is on the plaintiff to establish a prima facie showing of negligence against the defendant, and, if he fails to do so, that a nonsuit may be properly granted. To justify the denying of a nonsuit it is necessary only that a prima facie case of negligence be shown, from which the jury may reasonably infer that the defendant was guilty of negligence, or that the teacher was under a legal duty to warn and protect the plaintiff against the injury which he received. 19 Cal. Jur., p. 739, § 142. Ordinarily the presence of both negligence and contributory negligence are questions for the determination of the jury. 19 Cal. Jur., p. 719, § 133; *Id.*, p. 742, §§ 141-143. Under the circumstances of this case, we are of the opinion both of these questions should have been sub-

mitted to the jury. Regarding the question of contributory negligence, upon which the respondent relies, the fact that the ingredients which were used in manufacturing gunpowder were mixed together by the plaintiff in a mortar instead of pulverizing them separately on sheets of paper as directed by the text-book presents a proper question regarding the presence of contributory negligence for the jury to determine, in view of the age and inexperience of the student, especially since neither the text-book nor the teacher warned him against mixing the ingredients in that manner. There is evidence that he was ignorant of the dangerous character of this experiment. The plaintiff's alleged contributory negligence was therefore a proper question to be submitted to the jury.

The evidence shows that Mr. Williams, the chemistry teacher, was present in the laboratory during the experiment which resulted in the explosion; that he stood immediately behind the plaintiff and saw or may have seen not only the selection of the ingredients, but the fact that they were being mixed together in the iron mortar instead of pulverizing them separately on sheets of paper as directed by the text-book; and that he failed to warn the student of the danger of that method. The plaintiff testified in that regard:

"Q. Do you know whether or not Mr. Williams was in the room at any time during the time that you were doing the experiment upon the day of the explosion? A. Yes sir. He was there. * * * When I and Angelo were mixing this ingredient, he just walked behind us. * * *

"Q. At the time that you and Angelo were mixing these ingredients, Mr. Williams walked by you? A. Yes sir. * * * We just had thrown them in. * * * In that iron mortar.

"Q. You say he didn't say anything to you? A. No sir.

"Q. Do you know where Mr. Williams was at the time of the explosion? A. Yes sir.

"Q. Where? A. Well, he was about 15 feet behind me. * * * He was looking right towards me."

From the foregoing evidence a reasonable inference may be drawn that the chemistry instructor saw the grinding of the ingredients in the iron mortar with the pestle, yet he failed to warn the boys against the danger of that method of mixing them. He knew the boys were then compounding the materials for the experiment of manufacturing gunpowder. The plaintiff testified that just before they began the experiment he "went up

to Mr. Williams" and said "I and Angelo are going to make that gunpowder experiment." The instructor consented to their doing so.

The plaintiff testified that he did not know the difference between potassium nitrate and potassium chlorate; that they looked the same to him. They were kept in similar boxes on a shelf near the mortar where they were mixing the ingredients. Regarding his ignorance of the difference between these elements, and a lack of instruction in that regard, the plaintiff testified:

"Q. Do you know the difference between those two matters? A. No sir.

"Q. Had Mr. Williams or anyone else in authority in the school ever told you that it was dangerous to use potassium chlorate in the performing of the explosion or gunpowder experiment? A. No, sir.

"Q. Had Mr. Williams or anyone else in authority of the school ever told you it was dangerous to grind sulphur, carbon and potassium chlorate or potassium nitrate together in that iron mortar? A. No, sir. * * *

"Q. Had Mr. Williams or anyone else in authority ever warned you against using potassium chlorate in the performance of this experiment 40 or the making of an explosive? A. No sir.

"Q. Had Mr. Williams or anyone else in authority ever warned you that it was dangerous to mix these various ingredients together * * * in the mortar * * * by pounding or working it around? A. No sir. * * *

"Q. The second time that you did this experiment * * * was Mr. Williams present at that time? A. Yes sir.

"Q. And he did not at that time or afterwards discuss the experiment with you? A. No sir."

In support of his claim that he did not know the difference in appearance between potassium nitrate and potassium chlorate, the plaintiff said:

"Q. Do you know what the other one was? A. They both look alike. * * *

"Q. You mean you don't know what the fourth ingredient was? A. No, I don't remember. They both,—chlorate and nitrate, as I know them, both look alike."

The plaintiff used the same ingredients at the time of the explosion which he had previously used. He testified in that regard:

"Q. Why did you use potassium chlorate? A. That is what I used before.

"Q. The book called for potassium nitrate? A. Yes sir. * * * I didn't know it at the time, though. * * *

"Q. The materials were kept in that cabinet, weren't they? A. No sir.

"Q. As a rule? A. No sir.

"Q. Did you observe or have handed you a paper apparently mimeographed, entitled 'Rules for Conduct in the Chemical Laboratory'? A. No sir.

"Q. Did you see on the wall such a paper? A. No sir.

"Q. You knew that you were supposed to ask for ingredients? A. No sir.

"Q. Before you get them, didn't you? A. No sir.

"Q. You did not? A. No sir."

The respondent argues that the plaintiff recklessly experimented with the dangerous ingredients with knowledge of that danger, just to get the thrill from an explosion. Fairly considered, we think the evidence discloses no previous knowledge on his part of the identity or danger of using potassium chlorate, or of mixing together in an iron mortar the ingredients for compounding gunpowder. The reasonable inference secured from the record is that the plaintiff was mixing the gunpowder ingredients for the very purpose of obtaining an explosion, which is the result for which the text-book experiment is intended. The text reads: "From this experiment we may see that solids may explode." The plaintiff testified in that regard:

"Q. As a matter of fact you were performing this experiment to get a kick out of the explosion, weren't you? * * * A. No, I was not.

"Q. What? A. No, sir.

"Q. What was your purpose? A. Well, to make a pop out of it.

"Q. To make a pop out of it? A. Sure.

"Q. You wanted to see it go off, is that right? A. Yes sir.

"Q. And you and Angelo Marchese decided because it hadn't popped sufficiently on another occasion that you would add a little something to it to see if you couldn't get a bigger pop, didn't you? A. No sir.

"Q. What? A. No sir.

"Q. Well, why did you use potassium chlorate? A. That is what I used before. * * *

"Q. Then, on each occasion, you used the potassium chlorate out of this particular container? A. Yes sir."

It is the contention of defendants and respondents that the conclusion reached above is in conflict with the decisions of this court in *Studer v. Southern Pacific Company*, 121 Cal. 400, 53 P. 942, 66 Am. St. Rep. 39, *Wallace v. Great Western Power Company*, 204 Cal. 15, 266 P. 281, and *Bolar v. Maxwell Hardware Company*, 205 Cal. 396, 271 P. 97, 60 A. L. R. 429. In the *Studer Case* a twelve year old boy sought to cross a street by climbing over the coupling of two cars, and was crushed to death. In the *Wallace Case*, a boy of about the same age climbed an electric tower and was electrocuted by a high voltage cable. In the *Bolar Case*, a fifteen year old boy purchased gunpowder at the defendant's store, and constructed a "cannon," which he loaded and discharged, the resulting explosion injuring him severely. In each of the above cases it was held that the child was of sufficient age to be charged with contributory negligence in his actions. It is at once obvious that these decisions are completely distinguishable from the instant case in an important particular, namely, that they all involve voluntary acts by the children concerned. In the instant case, the particular experiment was prescribed as part of the course and the plaintiff was instructed to perform it. It is not a case, therefore, of "the whole plan originating in his own mind," and "carried out secretly" with knowledge that he would be forbidden to put it into execution if discovered, as held in the *Bolar Case*, supra. On the contrary, the experiment was required and was conducted openly in full view of the instructor.

[8] It may well be doubted whether it is proper in an introductory school course in chemistry to require pupils to make and ignite an explosive. It would appear that the dangers of such an experiment, incorrectly performed by young children, might be anticipated; and that the benefits to be derived from its actual performance by each pupil are not so great as to justify the risk of serious injury to the child. But at the very least, if it is to be performed, it necessarily requires the strictest personal attention and supervision of the instructor. We have no sympathy with the defense that the book called for certain ingredients, and that "the idea of putting in some other ingredients was out of his (the plaintiff's) own mind."

The judgment is reversed.

2 Cal.2d 550

**LANG et al. v. RAILROAD COMMISSION
OF CALIFORNIA.**

S. F. 15065.

Supreme Court of California.

Feb. 28, 1935.

1. Automobiles ⇨63

Railroad Commission *held* without jurisdiction over private contract truck carriers, either in matter of fixing rates, or for any other purpose.

2. Carriers ⇨12(6½), 18(2)

Tank truck carriers as interveners in matter of suspension of rates by rail carriers were parties to controversy and could petition for rehearing, and on denial thereof, apply to Supreme Court for writ of review to determine lawfulness of Railroad Commission's order vacating suspension (St. 1915, pp. 158, 160, §§ 61 (a), 66; St. 1933, p. 1157, § 67).

3. Carriers ⇨18(2)

Order of Railroad Commission vacating suspension of rates filed by rail carriers *held* reviewable since in effect an order approving and allowing rates as filed by carriers (St. 1933, p. 1157, § 67).

4. Carriers ⇨12(5)

Where reduced rates fixed by schedule voluntarily filed by rail carriers were sufficient to more than meet all actual and immediate costs of transportation, competing truck carriers could not contend that rates were unreasonable even if rates would not pay their full share of transportation expenses including all operating expenses and fixed charges, and, in addition thereto, interest on bonded indebtedness and reasonable return to capital invested in carrier service.

5. Carriers ⇨12(7)

Evidence *held* to justify Railroad Commission's finding that reduced rates fixed by schedule voluntarily filed by rail carriers were necessary to meet competition of truck carriers.

6. Carriers ⇨12(5)

Rail carriers in competition with truck carriers for business could, within zone of reasonableness, prescribed by statute, adjust rates so as to obtain or retain desired traffic for their own lines.

7. Carriers ⇨12(7)

Interstate Commerce Act, National Recovery Act, and Federal Transportation Act *held* without application to question of reasonableness of reduced rates fixed by schedule voluntarily filed by rail carriers (Interstate Commerce Act, § 15a, 49 USCA § 15a;

National Industrial Recovery Act, 48 Stat. 195; Transportation Act of 1920, § 500, 49 US CA § 142).

8. Constitutional law ⇨298(2)

Order of Railroad Commission approving reduced rates filed by rail carriers *held* not to deprive competing truck carriers of property without due process of law (Const. Cal. art. 1, § 13; Const. U. S. Amend. 14, § 1).

9. Carriers ⇨18(2)

In proceeding to review action of Railroad Commission in approving reduced rates filed by rail carriers, point not urged before commission could not be considered by Supreme Court (St. 1915, p. 160, § 66).

In Bank.

Proceeding by Mike Lang and Howard M. Lang, copartners, doing business under the firm name and style of the Lang Transportation Company, and others against the Railroad Commission of the state of California. To review an order of the respondent vacating order suspending rates proposed to be charged by the Southern Pacific Company and others for hauling and transporting petroleum products and kindred commodities.

Affirmed.

Sanborn & Roehl, W. H. Kessler, Clair MacLeod, and Hugh Gordon, all of San Francisco, for petitioners.

Rex B. Goodcell, of Los Angeles, amicus curiæ.

Arthur T. George, Ira H. Rowell, and Roderrick B. Cassidy, all of San Francisco, for respondent.

G. E. Duffy, of San Francisco, for Atchison, T. & S. F. Ry.

E. E. Bennett and E. C. Renwick, both of Los Angeles, for Los Angeles & Salt Lake Ry.

L. N. Bradshaw, of San Francisco, for Western Pac. R. Co., Sacramento Northern Ry. Co., and Tidewater Southern R. Co.

J. E. Lyons, of San Francisco, for Southern Pac. Co.

R. E. Wedekind, of Los Angeles, for Pacific Elec. Ry. Co.

CURTIS, Justice.

Some time prior to the 9th day of March, 1933, the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, the Los Angeles & Salt Lake Railroad Company, the Pacific Electric Railway Company, the Western Pacific Railroad Company, the Sacramento Northern Railway Company, the

Tidewater Southern Railroad Company, and the Pacific Freight Tariff Bureau filed in the office of the Railroad Commission of the state of California their tariff publications or schedules of rates to be charged by said companies for hauling or transporting petroleum, petroleum products, and kindred commodities named therein to and from various points in the state of California. The rates proposed to be charged for the transportation of said commodities was less than the rates theretofore charged by said companies for like services. On March 9, 1933, the commission suspended the operation of said rates, and thereafter made further orders of suspension, the last of which carried the period of suspension up to December 10, 1933. The orders of suspension were made for the purpose of permitting an investigation by the commission of the reasonableness of said proposed rates. This investigation was undertaken in the first instance by the commission upon its own initiative, and later a large number of tank truck operators, including all of the petitioners herein, protested the approval of said proposed rates, and joined in said investigation in support of their said protest against said schedule of rates as proposed by the railroads. Said protestants, including the fourteen petitioners herein, are private carriers of petroleum products, principally gasoline, from refineries to distributing stations, and from refineries and distributing stations to garages and service stations. In addition to gasoline, various other petroleum products are transported by petitioners, such as smudge oil from refineries to farms and ranches, road oil from refineries to construction jobs, fuel oil from refineries to customer's tank, and package goods to various destinations. Petitioners, with the other protestants, some time prior to the filing by the railroad companies of their new schedule of rates, had each filed a separate application before the Railroad Commission for a certificate of public convenience and necessity to operate an auto-truck line for the transportation of petroleum and petroleum refined products between points in the state of California. These applications and the matter of the suspension of the schedule of rates filed by the rail carrier were consolidated and heard together. The hearing of these matters extended over a number of days, during which a large amount of testimony, both oral and documentary, was laid before the commission. On final hearing the commission, by order concurred in by three members of the commission, denied the applications of the truck tank owners for certificates of public convenience and necessity, and vacated its several orders suspending the

reduced rates on petroleum products, as set forth in the schedule of rates filed by the several railroad companies heretofore referred to. Thereafter the petitioners herein filed their petition for a rehearing of said matters. The commission thereupon ordered that oral argument on said matters be made and fixed a day for hearing the same. After argument, the commission again made its order vacating its previous orders suspending said rates. The petitioners herein thereupon filed in this court their petition to annul that part of those orders of the commission which vacated said orders of suspension. No attack is made upon that part of the orders of the commission denying the applications of the tank truck owners for certificates of public convenience and necessity, so the validity of the orders of the commission, in so far as they resulted in a denial of said applications, is not questioned in this proceeding.

The sole question, then, presented by the petition now before us concerns the action of the commission in vacating the orders of suspension of the rates filed by the railroads, which vacating orders had the effect of fixing and establishing said rates as reasonable and valid rates to be charged by said railroad companies for the transportation of petroleum products by said rail carriers throughout the state of California.

[1] As a background to the pending controversy between the rail carriers and the tank truck operators, the record before the commission, which by the order of the court has been brought before us for the purpose of review, discloses that up to the years of 1924 and 1925, the rail carriers enjoyed exclusively the business of transporting gasoline and other petroleum products in this state. Their service was not entirely satisfactory to some of the major oil companies, with the result that the oil companies induced various truck operators to equip themselves with tank trucks and to engage in the transportation of gasoline and other petroleum products. The rates agreed upon by the oil companies and the truck operators were substantially lower than those then charged by the rail carriers. The service of the truck operators was also more flexible and expeditious than that rendered by the rail carriers. This improved service and reduced rates, as a matter of course, caused a large volume of this business to leave the rail carriers and go to the truck operators, with the result that, at the time of the hearing of the matter before the commission, the amount of this business enjoyed by the truck operators exceeded that of the rail carriers by at least 55 per cent. The

truck operators built up a business representing an investment of over \$2,500,000. The railroads, undoubtedly for the purpose of holding this business, improved their service and made sweeping reductions in their rates. This reduction in rates was promptly met by the truck operators. The business of the railroads continued to decrease and that of the truck operators showed a corresponding increase. Continuing their efforts to recover this business, the rail carriers, early in the year 1933, filed with the Railroad Commission the schedule of rates, the order for the suspension of which was vacated by the commission and which is now before us for review. In the majority opinion of the commission it is stated that, "the railroads feel that this particular business belongs to them, although they are now enjoying less than half of it. They are determined to regain it, to which end they earnestly seek to justify the lower rail rates under suspension. These rates are based on a scale of 8 cents per 100 miles, minimum 4 cents. According to the testimony presented at considerable length they can be reduced 69 per cent more before causing a burden on other traffic." On the other hand, the tank truck operators insist that they supplied a real need when rail service was unreasonably high and admittedly inefficient, and that the rail carriers should not be permitted to cut rates to a point which will practically eliminate the tank truck operators from the business of transporting the gasoline and other petroleum products of the state. The minority opinion supports the position of the tank truck carriers. The members of the commission joining in that opinion favored the granting of the applications of the tank truck carriers for certificates of public convenience and necessity and adjusting the rates upon some equitable basis which would permit both rail and truck carriers to compete for this business upon terms fair and equal to both parties. But neither the minority members of the commission nor the truck carriers suggest any method whereby such a solution of the problem can be accomplished. As we have seen, the truck carriers are private carriers. They do not operate over any regular route, nor between fixed termini. Their services are performed entirely through private contract. They have never dedicated their property to public use. The Railroad Commission has no jurisdiction over them, either in the matter of fixing the rates that they will charge, or for any other purpose. *People v. Duntley*, 217 Cal. 150, 17 P. (2d) 715; *People v. Lang Transportation Company*, 217 Cal. 166, 17 P.(2d) 721; *Frost &*

Frost Trucking Co. v. R. R. Com., 271 U. S. 583, 46 S. Ct. 605, 70 L. Ed. 1101, 47 A. L. R. 457. The petitioners herein evidently concede that their legal status is that of private carriers, and that the commission has no jurisdiction to fix the rates which they may charge for their services, as they have taken no exception to that part of the order of the commission denying their applications for certificates of public necessity and convenience.

[2, 3] Before proceeding to the consideration of those questions which concern the merits of this proceeding, we will answer certain objections in which the respondent attacks the right of the petitioners to maintain this proceeding. In the first place, the respondent contends that petitioners are mere interveners in the matter of the suspension of said rates, and that, as such, have no right to maintain this proceeding. We do not so understand the position of the petitioners. While the commission, upon its own initiative, suspended the operation of said rates, the record shows that thereafter the petitioners, and other tank truck carriers, protested the rates as filed by the rail carriers, and the matter was thereafter heard upon the protest of the tank truck carriers as well as upon the voluntary action of the commission in temporarily suspending said rates. But even as mere interveners, they are made parties to the controversy (section 61, subd. (a), Public Utilities Act, St. 1915, pp. 115, 153, Act 6386, Deering's Gen. Laws, 1931), and, as such, could petition for a rehearing (section 66, Public Utilities Act, St. 1915, pp. 115, 160, Act 6386, Deering's Gen. Laws, 1931), and upon its denial could apply to this court for a writ of review for the purpose of determining the lawfulness of said order (section 67, Public Utilities Act, St. 1915, p. 161, as amended by St. 1933, p. 1157, Act 6386, Deering's Gen. Laws Supp. 1933). Neither is there any merit in respondent's objection to the maintenance of this proceeding by petitioners upon the ground that the order of the commission vacating said order of suspension was a negative order and therefore not subject to review. The order vacating the suspension of said rates was, in effect, an order approving and allowing the rates as filed by the rail carriers. It was, therefore, reviewable. *McLean Lumber Co. v. United States (D. C.)* 237 F. 460; section 67, Public Utilities Act, *supra*.

With these procedural questions disposed of, we will proceed to a consideration of the main controversy between the parties to this proceeding, and that is whether the Railroad Commission has regularly pursued its author-

ity in vacating the orders suspending the schedule of rates set forth in the tariff publications filed by the rail carriers with the respondent commission.

[4] Petitioners contend that the rates contained in the schedule filed by the rail carriers are unreasonable in that they do not and will not pay their full share of what are known as transportation expenses, and in this connection transportation expenses include all operating expenses and fixed charges, and, in addition thereto, interest on bonded indebtedness and a reasonable return on the capital invested in the carrier service. They quote from an early decision of the Interstate Commerce Commission the following statement defining the term "reasonable rate": "Rates cannot be said to be reasonable which are not reasonably remunerative to the carrier, and rates which do not pay their full proportion of operating expenses, fixed charges and reasonable dividends are not per se or 'in and of themselves' reasonably remunerative. * * * Traffic should be made, if possible, to pay its due proportion of operating expenses, fixed charges and reasonable dividends." Board of Trade v. Nashville, C. & St. L. Ry. Co., 8 I. C. C. 503, 524. The principle announced by the Interstate Commerce Commission above is approved in the following decisions of the Supreme Court of the United States: Board of Public Utility Com'rs v. N. Y. Tel. Co., 271 U. S. 23, 46 S. Ct. 363, 70 L. Ed. 808; McCordle v. Indianapolis W. Co., 272 U. S. 400, 47 S. Ct. 144, 71 L. Ed. 316; Bluefield Co. v. Pub. Serv. Com., 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176; Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134; Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819.

These cases, however, all involved proceedings in which some regulatory agency, like the Railroad Commission of this state, for instance, was attempting to impose maximum rates which a public utility claimed were confiscatory. The rule announced in those cases is entirely different from that governing cases where the carrier or other public utility is voluntarily offering the rates in question, as the railroads in the present instance are doing. This difference in the rules as applied to rates under these two different situations is pointed out by the Interstate Commerce Commission in the following excerpt from one of its opinions: "Where a rate imposed by a regulatory body is under judicial review upon the allegation that the rate fixed is confiscatory, it has been held by the courts that a rate may not lawfully be fixed by such tribunal

which is based alone on the out-of-pocket costs ascribable to that particular traffic, but that to be lawful the rate must be sufficient to cover a ratable proportion of the average cost of freight traffic generally, including a return on the property devoted to public service. To hold otherwise would compel the performance of a certain specified kind of service by the carrier at less than average cost. The extension of this principle to other classes of traffic, if pursued far enough, would bankrupt the road.

"Where, however, carriers voluntarily propose to reduce certain rates to an out-of-pocket plus basis in order to augment the total traffic carried, a wholly different situation is presented. The menace of confiscation is absent, for *volenti non fit injuria*; and the additional traffic, if secured with a resulting augmentation of net revenue instead of laying a burden upon other traffic, affords the possibility of lightening the burden thereon by bringing a greater tonnage under contribution to net revenue.

"The criteria of a reasonably compensatory rate in a confiscation case are therefore essentially distinct from the criteria of a reasonably compensatory rate where carriers volunteer a reduction on certain rates to an out-of-pocket plus basis. In the first set of cases the carrier has presumably been charged with seeking to extract from the public which is served more than the services are reasonably worth; in the second set of cases the carrier is accused by protestants, not primarily of seeking to extort more than the service is reasonably worth to those who receive the service but of working undue discrimination as between those who can and those who can not avail themselves of the lower rates voluntarily proposed." The Transcontinental Cases of 1922, 74 I. C. C. 48.

In a later opinion filed by the commission this principle was reiterated in the following language: "We have repeatedly held that the carriers may, subject to certain restrictions, initiate rates lower than we may prescribe. The question is as to whether or not in this instance they are proposing to go to such lengths in attempting to meet competition and attract business that the resulting charges will be so low as to create a burden upon other traffic. In this connection cost figures have been submitted which, although tending to show that the proposed charges will probably not cover all costs if cost is to be ascertained by distributing all burdens over all traffic, do indicate that they will produce considerable return in excess of the direct out-of-pocket costs of the services. Whether the proposed

reduction will result in a sufficient increase in business to more than offset the loss in revenue which it would entail on the amount of business which would be handled whether the reduction is made or not is of course a question to which only actual operation under the reduced charge can furnish a satisfactory answer. In our judgment respondents have sufficiently justified the proposed reduction, and we so find." Handling Charges on Cement, Fertilizers, and Salt at South Atlantic and Gulf Ports, 93 I. C. C. 640, 644, 645.

No claim is made by petitioners that the rates fixed by the schedules filed by the rail carriers are not sufficient to more than meet all the actual and immediate costs of transporting said products, referred to by the Interstate Commerce Commission as the "out-of-pocket costs." Upon that question the majority of the respondent commission, speaking through Commissioner Carr, held as follows:

"It is not an exaggeration to say that in no instance since the writer of this opinion has been a member of this Commission have the rail carriers so fully and convincingly justified a rate under suspension as have the carriers justified the rates here under suspension. The history and development of rates on gasoline were displayed at great length, indicating a somewhat haphazard development of a rate structure for this class of traffic and the need for some stable and logical basis for the construction of the tariff. The suspended rates, it was shown, are constructed on such a basis. Evidence was presented in detail showing that rates heretofore in effect did not and would not retain this traffic and that in the absence of a comprehensive revision and reduction in rates the traffic would gradually leave the rails. Economic studies were presented on costs of moving the traffic and indicating the prospective earnings from the gasoline movement on the assumption that the suspended rates would attract back to the rails varying percentages of the movement lost. While it may be said that the course of the carriers in thus seeking to reduce rates on gasoline represents a somewhat daring exercise of managerial discretion and judgment, it cannot be said that the effort is hasty or ill conceived or without prospect of bettering the financial condition of the carriers. It would be a clear abuse of discretion for this Commission to permanently suspend the rates proposed."

Neither the minority opinion nor the petitioners contend that this finding of the commission in respect to the rates being more than sufficient to cover the "out-of-pocket costs" is not supported by sufficient and com-

petent evidence. In fact, as we view the record, the evidence in support of this finding is practically without conflict. It cannot, therefore, be held by this court that said rates are unreasonable. They do not cast an unreasonable burden upon other traffic. On the other hand, they afford some opportunity to the rail carriers of securing additional traffic, which will produce a net revenue and thereby afford an opportunity of lightening the burden on other traffic.

[5] Petitioners make the further contention that the evidence before the commission did not justify the conclusion that the rail rates in issue were necessary to meet truck competition. The evidence shows that the total number of tons of gasoline moved by rail in the year 1928 was 1,980,992 tons, and that there was a gradual reduction in this amount up to and including the year 1932, the year immediately preceding the filing by the rail carriers of their schedule of rates now under attack. In 1931 the number of tons of gasoline moved by rail was 1,263,411 tons, and in 1932 it was 967,118 tons. The percentage of this business transacted by the rail carriers in 1928 was 54.5 per cent. This percentage shows a gradual reduction until the year 1932. In 1931 it was 27.5 per cent., and in 1932 it had fallen to 21.7 per cent. On the other hand, this same evidence (Exhibit 5 attached to petition for review) shows that the amount of gasoline moved by applicants in 1928 was 597,899 tons, and that this amount showed a gradual increase up to and including the year 1932, when it was 1,504,497 tons, while the percentage of this business handled by applicants increased from 16.5 per cent. in 1928 to 32.1 per cent. in 1931, and to 33.7 per cent. in 1932. The balance of business of transporting gasoline in the state during these years was done by the water carriers and small truck operators not included among the petitioners. The highest percentage of business enjoyed by these small truck operators was 15.4 per cent. in 1931. No figures are given as to these small truck operators for the year 1932. This evidence shows beyond question that the truck carriers not only were real competitors of the railroads for this business, but there was a gradual and steady movement of this business from the rails to the trucks. This was the situation in the early part of 1933 when the rates in issue were filed by the rail carriers. A tabulation of the rates, or at least a substantial portion thereof, charged by the railroads in previous years, together with those under consideration, has been prepared by petitioners and set forth in their opening brief on pages 29 to 33, inclusive. This tabulation is too

lengthy to set forth in full in this opinion, and for that reason we will only show the first five items thereof, which are typical of all others shown thereof. According to this tabulation the rates in effect for transporting gasoline per 100 pounds were as follows:

Rates in Cents per 100 Pounds in Effect

From Richmond To	Up to Nov. 10, 1926.	Up to Mar. 10, 1928.	Up to July 30, 1931.	Up to Dec. 16, Consid- eration	Under
Hollister	25	25	19	9	7½
Watsonville	25	25	19	10	8
Salinas	29½	29½	22	10	8
Paso Robles	44	44	44	20	16
Oakdale	20	17	14	11	7

This tabulation shows that as a rule the prior reductions in rates were much more drastic than that effected by the present rates. Still they did not stop the movement of this class of business from the rail carriers to the truck owners. Confronted with this situation, the railroads were compelled either to concede this business to the trucks or make further reductions in their rates in an effort to retain what business they then had, and possibly regain that, or at least a part of that, which they had lost. The above evidence, in our opinion, was ample to justify the finding of the commission that the rates in issue were necessary to meet the competition of the truck carriers.

[6] "As the carriers are in competition for the business, they may, within the zone of reasonableness, prescribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. [Citing authorities.] The theory of the act is that the carriers in initiating rates may adjust them to competitive conditions." *Texas & Pacific Ry. Co. v. U. S.*, 289 U. S. 627, 636, 53 S. Ct. 768, 771, 77 L. Ed. 1410, 1421. The same principle is approved in *Interstate Commerce Commission v. Chicago Great Western Railway Co. et al.*, 209 U. S. 108, 112, 28 S. Ct. 493, 52 L. Ed. 705. This has been the ruling of the respondent commission in the following proceedings: *Southwestern Portland Cement Company v. A. T. & S. F. Ry. Co. et al.*, 38 Cal. R. C. 473, 477, and *Union Rock Co. v. A. T. & S. F. Ry. Co.*, 27 Cal. R. C. 285, 296.

[7] We are unable to perceive how section 15a of the Interstate Commerce Act (U. S. Code, Tit. 49, § 15a), 49 USCA § 15a, has any application to any question arising in the present proceeding. Its provisions are lengthy and we are not directed to any particular provision of this section which has been violated by the respondent commission in its order vacating the suspension of said rates. If these rates are in conflict with rates

fixed by the Interstate Commerce Commission for interstate commerce of the same character in this state, no showing has been made by petitioners indicating such conflict. Neither are we able to find anything at all helpful in the decision of the Interstate Commerce Commission rendered in the proceeding entitled, *Rates on Refined Petroleum Products from, to, and between Points in the Southwest*, 174 I. C. C. 745. It is contended by petitioners that in that proceeding it was held "that any interstate rate which was less than 75% of a maximum reasonable rate was not compensatory and burdened other traffic." We find no such ruling in that proceeding. We do find that under the particular facts in that case the respondents therein were awarded the right to establish "rates not less than 75 per cent of the scale herein approved, to meet competition of motor trucks and pipe lines carrying refined petroleum products." This is an entirely different proposition than that stated by petitioners. No attempt was made in that decision to establish a standard of interstate rates which in their relation to maximum reasonable rates would be controlling in all cases, or even controlling generally in cases of that character. The facts in that proceeding are so different from those now before us as to render that decision of slight, if any, assistance in the determination of the questions confronting us in the present proceeding.

[8, 9] Neither, in our opinion, has the National Industrial Recovery Act (48 Stat. 195) or section 500 of the Transportation Act of 1920 (49 USCA § 142), each of which is the result of federal legislation, any bearing upon any question involved in this proceeding. We are not impressed with the contention of the petitioners and of *amicus curiæ* that the decision of the commission violates the Constitution of this state (article 1, § 13) or the Constitution of the United States (amendment 14, § 1), in that it deprives the petitioners of their property without due process of law. Originally, as we have stated above, the business of transporting petroleum products was enjoyed almost exclusively by the rail carriers. The truck carriers later, by reduction of rates and other means, were able to divert a major portion of the business to themselves. The railroads are simply endeavoring to regain this business. If they succeed, they will do no more toward depriving the truck owners of their property than the latter succeeded in doing when they drew this business, or a large portion of it, from the railroads. In neither case has either party deprived the other of its property without due process of law, as

this term is used in the State and Federal Constitutions. Furthermore, as this point was not urged before the commission upon the hearing of the petition for rehearing, this court is precluded from considering it in the present proceeding brought to review the action of the commission. Section 66, Public Utilities Act, Stats. 1915, pp. 115, 160, Act 6386, Deering's General Laws, 1931.

We appreciate that whichever way this proceeding is decided, the result will work a hardship upon one or the other of the parties hereto. To permit unrestrained and unregulated competition to be carried on between the rail carriers on the one hand and the tank truck carriers on the other will be disastrous to both parties, and, it is conceded, will eventually result in the railroads driving the truck carriers out of this particular class of business and will to a large extent render worthless the large investment of the truck carriers, now estimated to amount to over \$2,500,000. On the other hand, to fix, or as the expression is often used in the record, to "peg" the rail rates, without regulating the rates to be charged by the truck carriers, and it is admitted that the commission has no authority over the rates to be charged by the truck carriers, would permit the latter to cut under the rail rates fixed by the commission, with the result that practically all of this business would leave the rail carriers and go to the truck carriers. The commission appreciated the dilemma in which the carriers were placed and concluded that it was powerless to remedy the existing condition. The minority members of the commission favored the fixing by the commission of a differential in the rates, in favor of the rail carriers, that is, that the rates to be charged by the rail carriers would be less than those fixed for the truck carriers, as it was conceded that on an equality of rates the rails could not hope to compete with the trucks. They admitted, however, that upon the record before them it was impossible to determine with any degree of certainty just the amount of such differential. But the more serious question, as it appeared to the majority members of the commission and as it appears to us, is that any schedule of rates the commission might fix would not be binding upon the truck carriers, therefore it would be an idle act for the commission to attempt to adjust the differences between the two classes of carriers, when only one class would be bound by such arrangement, leaving the members of the other class to conform to it or violate it, as to their interest might seem best. Even if the commis-

sion should grant the applications of the petitioners for certificates of public necessity and convenience, assuming that this could legally be done, and the truck carriers brought within the jurisdiction of the commission and therefore subject to the rate fixing power of the commission, that would not prevent other private truck carriers from springing up and fixing rates lower than those established by the commission, and in that manner drawing this business away from both the petitioning truck carriers and the railroads. Until truck carriers are brought within the jurisdiction of the commission and the latter is given power to fix rates to be charged by them, we see no way that the commission can stabilize this business between them and the rail carriers. We are, therefore, in accord with the conclusion reached by the majority members of the commission in vacating the orders of the commission suspending the rates, as filed by the rail carriers, and, in our opinion, the commission in so doing regularly pursued its authority.

The orders of the respondent commission vacating said orders of suspension are hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; LANGDON, J.



3 Cal.2d 12

STALDER v. STALDER.

S. F. 15046.

Supreme Court of California.

March 28, 1935.

Husband and wife ☞264

Evidence held to sustain finding that rents derived from apartment house were not community property so as to entitle divorced husband to one-half thereof.

In Bank.

Appeal from Superior Court, San Francisco County; Thos. F. Graham, Judge.

Action by Florence Stalder against Ernest B. Stalder, wherein defendant filed a cross-complaint joining as a cross-defendant Mar-

garet Sweeney. From a judgment, defendant appeals.

Affirmed.

Virgil J. Garibaldi and Alfred J. Hennessy, both of San Francisco, for appellant.

John J. Taaffe, of San Francisco, for respondent.

THOMPSON, Justice.

This is an appeal from that portion of the interlocutory decree entered in an action for divorce, instituted by Florence Stalder, which relates to the community property. The complaint alleged there was no community property. By answer and cross-complaint, joining as a cross-defendant Margaret Sweeney, the daughter of the plaintiff by a former marriage, the defendant asked for a decree of divorce on the ground of extreme cruelty of the plaintiff and alleged the existence of community property in the amount of \$10,000, consisting of cash in the bank, an automobile, and household furniture in an apartment house at 820 Ashbury street, San Francisco, and a one-half interest in the apartment house itself, which stands in the name of Margaret Sweeney, the transfer from the plaintiff to her being alleged to have been without consideration and in fraud of creditors. It is further alleged by defendant that about \$9,000 belonging to the community, the returns from the "furnished apartment house business" run by both himself and his wife, were invested in the apartment house in repairs, improvements, and the reduction of encumbrances thereon with the knowledge of the cross-defendant, and he asks that he be declared entitled to two-thirds of the community property and that the deed from Florence Stalder to Margaret Sweeney be set aside.

The trial court found that the parties were married in Oakland on February 29, 1929, had been separated since August 1, 1931, and that plaintiff was entitled to a decree of divorce upon the ground of the habitual intemperance of the defendant. The total community property was found to consist of \$1,029 cash and a car worth approximately \$500. It was further found that there was no household furniture belonging to the plaintiff and defendant as community property or otherwise; that it was untrue that \$5,683.88 cash belonging to the community had been used by the plaintiff to pay off a deed of trust on the apartment house; that the apartment house had been transferred by the plaintiff to Margaret Sweeney prior to the marriage on June 25, 1928, for \$2,500 cash, was a bona fide

transaction, and the apartment-house property belonged solely to the cross-defendant and was no part of the community property of the plaintiff and defendant; and that there was no community property other than the \$1,029 cash and the automobile as previously expressly found.

Pursuant to these findings and conclusions of law in accordance therewith, the trial court entered its judgment, granting a divorce to the plaintiff, dividing the community property as follows: \$1,000 to the defendant, the remainder to the plaintiff, and quieting title to the apartment house in the cross-defendant Margaret Sweeney. The record on this appeal consists of the judgment roll and a bill of exceptions. The specifications of error challenge the sufficiency of the evidence to sustain the findings of the court with reference to the community property. In his opening brief appellant asks this court to reverse the judgment with directions to the trial court to enter judgment for the sum of \$4,550 and to declare it a lien on the apartment house on the theory that that is his share of the community property remaining undisposed of by the decree. He claims this amount as half of the money (proceeds of the business of operating a furnished apartment house, in which business Margaret Sweeney had no interest) which was earned by himself and his wife during the marriage and was put back into the apartment-house property.

There is no doubt but that the finding of the trial court that the rents derived from the apartment house were not the community property of the plaintiff and defendant must be sustained. From the excerpts of the testimony of the plaintiff and defendant and of the cross-defendant which are printed by defendant in his bill of exceptions, it appears without substantial contradiction that the apartment house was conveyed to Mrs. Sweeney about seven months prior to the marriage of the plaintiff and defendant; that, at the time of the conveyance, the plaintiff owed her daughter between \$2,500 and \$3,000; that, because her mother had no other income and she would otherwise have had to support her, Mrs. Sweeney arranged with her mother to look after and manage the apartment house in return for an apartment in which to live and enough money for her needs, which she was to take out of the rents collected by her, the rest of the rents to be applied to repairs and improvements and to paying off the indebtedness upon the apartment-house building. It further appears from the testimony of both mother and daughter that after the marriage of plaintiff and defendant, plaintiff

was to have an apartment to live in but all the rents were to be applied to the apartment house and were to belong to the daughter. The rents, it is true, were put by plaintiff in a bank account which she had jointly with the defendant, but she testified that at the time it was opened it was agreed that the income from the apartment house had to be accounted for. Mrs. Stalder further testified that no money from a restaurant run by her and none of the wages earned by defendant from time to time were ever put into the apartment house.

Appellant's argument that the earnings of both spouses are community property is immaterial, since it is clear from the recited evidence that the only earnings of Mrs. Stalder in connection with the apartment house were the rent-free apartment and such money as her daughter allowed her to keep to live on out of the rents collected in return for its management, the rents themselves belonging, as the trial court found, to Mrs. Sweeney.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.



5 Cal.App.2d 283

MOORE v. CRAIG et al.

Civ. 9000.

District Court of Appeal, Second District,
Division 1, California.

March 16, 1935.

1. Trial ⇨396(1)

While findings need not follow precise language of pleadings, findings must be so drawn that truth or falsity of every material allegation can be demonstrated therefrom.

2. Trial ⇨398

In action on note where defendants denied indorsement and transfer of note to plaintiff, allegedly erroneous finding, that allegations in defendants' answer were not true in so far as allegations were in conflict with prior findings of fact, could be disregarded, where court specifically found that note was indorsed and transferred as alleged, and finding that contrary was not true was unnecessary.

3. Trial ⇨395(1)

In action on note, where defendants alleged that payee promised to procure cancellation of lease on one of stores in building in payment for which note was executed, and that payee misrepresented that building was of steel construction and capable of supporting additional stories, findings stating that such allegations were not true *held* to sustain judgment against defendants.

4. Appeal and error ⇨219(2)

On appeal from judgment on note, defendants could not complain that findings were insufficient to sustain judgment where defendants raised no objection to findings when they were served.

5. Bankruptcy ⇨303(1)

In action on note by trustee of bankrupt corporation to which note was indorsed by payee's indorsee, judgment *held* properly rendered against makers where they presented no evidence to contradict *prima facie* showing of trustee as to title, and record disclosed some of details of transactions by which note was acquired by indorsers (Civ. Code, §§ 3099, 3111).

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Action by Wm. H. Moore, Jr., trustee of the estate of the Weaver Lumber Company, Limited, a bankrupt corporation, against Gavin W. Craig and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

W. T. Kendrick, Jr., and Walter L. Bowers, both of Los Angeles, for appellants.

Beardsley & Beardsley, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

The defendants appeal from a judgment entered against them on a promissory note, challenging the findings of the court as being insufficient to support the judgment.

The complaint alleges the execution and delivery by the defendants of a promissory note dated in January, 1929, due one year thereafter, and payable to one Hull; its endorsement and delivery by Hull to one Topham, in July, 1929; its indorsement and delivery by Topham to Weaver Lumber Company in October, 1930; and the appointment of plaintiff as the latter's trustee in bankruptcy after adjudication. The answer affirmatively alleges on information and belief that Hull did not indorse or deliver the note to Topham at the time alleged or at all, and de-

nies on information and belief that Topham transferred the note to the lumber company.

For a further defense, the defendants allege that they executed and delivered the note sued upon as part of the consideration for a store and office building purchased from Hull; that as a part of that transaction Hull agreed that he would procure the cancellation of a lease on one of the stores, but that he never did so; that after May, 1929, they first learned that Hull would not comply with his agreement, and for that reason refused to make further payments on the note. They also allege that by reason of the failure of Hull to perform his contract they were damaged in various ways. As an additional defense, the defendants allege that Hull represented the building to be of steel construction and capable of supporting additional stories, which representations were false and resulted in damage to them.

The trial court found specifically that all of the allegations of the complaint were true and then found as follows: "XIII. That the allegations contained in defendants' answer, and in the first amendment to defendants' answer are not true, in so far as said allegations are in conflict with the foregoing findings of fact. XIV. That the purported defense of the defendants in said original and amended answer, based upon the existence of a lease on one of the storerooms in said building, is not supported by the evidence, and that the allegations of said defense are not true. XV. That the purported defense of the defendants in said original and amended answer, based upon the type of construction of the Hull Building, and the alleged representations of the payee of the note regarding said construction, is not supported by the evidence, and that the allegations of said defense are not true."

[1] The defendants contend that these three findings, which are the only ones made on the issues raised by the answer, are insufficient to sustain the judgment against them. "While it is not necessary that the findings should follow the precise language of the pleadings, it is essential that they be so drawn that the truth or falsity of every material allegation can be demonstrated therefrom. The purpose of findings 'is to answer the questions put by the pleadings.'" *Frascona v. Los Angeles Ry. Corp.*, 48 Cal. App. 135, 138, 191 P. 968, 969.

[2] As to the first challenged finding, the questions put by the allegations of the complaint and the denials of the answer were answered by specific findings adverse to the de-

fendants. The allegation in the answer that Hull did not indorse or transfer the note is, in effect, only a denial of the averments of the complaint in that regard. This allegation and the denial of the indorsement and transfer of the note by Topham were sufficiently covered by the particular findings on the issues tendered by the complaint and this challenged finding may be disregarded. Where the court found that the note was indorsed and transferred as alleged, a finding that the contrary is not true is unnecessary. "It is true that the court merely adopted a general finding that all of the allegations of the defendant's answer in conflict with the plaintiff's first cause of action were untrue. This was ineffectual as a finding upon a necessary issue. But the affirmative finding that the defendant breached the contract on December 24, 1927, was tantamount to a finding to the effect that the contract was not terminated on December 10th, by mutual consent. * * * Where the finding which is adopted is equivalent to an adverse finding upon an issue which is involved, more specific findings upon the subject are unnecessary." *Wood v. Girot*, 102 Cal. App. 160, 165, 282 P. 981, 983.

[3, 4] The other two findings which defendants question are on the issues raised by the two separate defenses pleaded. One states that the allegations of the defendants' answer based upon the existence of a lease are not true. By the other the court finds that the allegations of the defendants' answer based upon the type of construction of the building purchased and the representations of the payee regarding the construction are not true. There can be no doubt as to the facts which the court found, and, when read with the other findings, they cover all of the issues raised by the pleadings. The following is also pertinent: "As to appellant's objection that the findings are not direct, but inferential and uncertain, it may be said that so far as the record discloses, appellant proposed no amendments to the findings and raised no objection as to their uncertainty when served, or prior to the signing of the same by the court; hence he cannot raise on this appeal for the first time the question of uncertainty, or that they are not sufficiently explicit. *Warren v. Hopkins*, 110 Cal. 506, 42 P. 986; *Parke v. Hinds*, 14 Cal. [415], 416; *Estate of Perry* [*Dixon v. Norman*], 64 Cal. App. 21, 220 P. 321." *Sweet v. Hamilothoris*, 84 Cal. App. 775, 782, 258 P. 652, 655.

[5] The defendants' position that the evidence of ownership of the note is not sufficient to sustain the judgment cannot be upheld. The same question was raised in the

case of *Pugh v. Dawson*, 95 Cal. App. 505, 516, 273 P. 39, 44, where the court said: "Possession of commercial paper, with indorsement, makes a prima facie case of delivery by the indorser to the holder and of ownership of the latter. In *Pastene v. Pardini*, 135 Cal. 431, 67 P. 681, the court said: 'The delivery was prima facie established by plaintiff's production and proffer of the note.' See note to *Bedell v. Herring*, 77 Cal. 572, 20 P. 129, 11 Am. St. Rep. 323, where the cases are collected. The proposition there laid down and supported by numerous cases is thus stated: 'It is well established that the mere possession of a negotiable instrument by the indorsee, or by the transferee where no indorsement is necessary, imports prima facie that he is the lawful owner, and that he has acquired it before maturity, bona fide, for value, in the usual course of business, and without any circumstances impeaching its validity.' *Linder Hdw. Co. v. Pacific Sugar Corp.*, 17 Cal. App. 81, 92, 118 P. 785, 789. See, also, Civ. Code, §§ 3099 and 3111; *Hall v. Thurston*, 176 Cal. 738, 171 P. 285; *Story on Prom. Notes*, § 196; *Brady v. Henry*, 71 Cal. 481, 482, 483, 11 P. 385, 12 P. 623, 60 Am. Rep. 543."

The defendants presented no evidence to contradict the prima facie showing of the plaintiff as to title, and the record further shows some of the details of the transactions by which the note was acquired by the indorsers. Plaintiff sufficiently proved ownership of the note.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



5 Cal.App.2d 519
**BERSHON v. MUNICIPAL COURT OF CITY
OF LOS ANGELES.**
Civ. 10307.

District Court of Appeal, Second District,
Division 1, California.
March 26, 1935.

Courts ⇐483

Superior court's order, transferring action to municipal court under authority of statute as amended after commencement of action, was purely procedural, and not at-

tempt to give retroactive effect to statute (Code Civ. Proc. § 396, as added by St. 1933, p. 1841, § 7).

Petition by David Bershon for a writ of prohibition to the Municipal Court of the City of Los Angeles.

Petition denied.

Wolfson, Swetow & Brown, of Los Angeles, for petitioner.

PER CURIAM.

The petition for writ of prohibition is denied. The order of the superior court, transferring to the municipal court the action described in the petition, was made under authority of section 396 of the Code of Civil Procedure as amended in 1933 (St. 1933, p. 1841, § 7). The matter was purely procedural, and the order did not constitute an attempt to give retroactive effect to the statute. Under such order and transfer the municipal court has jurisdiction over the action. *McClurg v. McClurg*, 212 Cal. 15, at page 18, 297 P. 27.



5 Cal.App.2d 306
ROY v. PACIFIC GAS & ELECTRIC CO.
Civ. 5233.

District Court of Appeal, Third District,
California.

March 18, 1935.

Rehearing Denied April 7, 1935.
Hearing Denied by Supreme Court
May 16, 1935.

1. New trial ⇐70

In action for death of apartment house tenant, brought against gas company on theory that death was caused by gas asphyxiation, evidence held to present sufficient uncertainties as to cause of death to authorize trial court to grant new trial after verdict for plaintiff.

Physician performing autopsy testified that autopsy revealed that decedent had heart trouble and a tumor of considerable size, and another physician testified that cyanide poisoning would produce similar appearances upon body of decedent, and that test upon which autopsy physician based his conclusion of death by monoxide gas would not have disclosed whether death was caused by cyanide poisoning.

2. New trial ⇐20

In action against gas company for death of apartment house tenant allegedly by gas asphyxiation, testimony of gas company's representative as to regulation of supply of gas to apartment held sufficient to justify trial court's granting of new trial after verdict for plaintiff, on theory that doctrine of *res ipsa loquitur*, if applicable to impute negligence to gas company in its supply of gas to apartment, had been refuted.

Appeal from Superior Court, Solano County; William T. O'Donnell.

Action by John D. Roy, administrator of the estate of Fern Mildred Roy, against the Pacific Gas & Electric Company. Judgment was rendered for plaintiff upon a verdict, and from an order granting a new trial, plaintiff appeals.

Affirmed.

See, also, *Roy v. Smith*, 134 Cal. App. 240, 25 P.(2d) 251, 26 P.(2d) 650.

Robert H. Schwab, of Sacramento, and Thomas J. Horan and Thomas F. O'Hara, both of Vallejo, for appellant.

Thomas J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, and W. U. Goodman, of Fairfield, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal from the order of the court granting a new trial after verdict and judgment based thereon in favor of the plaintiff.

The complaint alleges that on and prior to the 19th day of November, 1930, Fern Mildred Roy, deceased, was a tenant of apartment No. 5 in a certain building known as "Bay View Court Apartments," located at 215 York street, in the city of Vallejo. The apartment consisted of a living room, kitchenette, bedroom, and bath. One entering the apartment would enter the living room, pass through the kitchenette, and enter the bedroom. The complaint sets forth that the deceased came to her death by reason of the escape of monoxide gas from a gas furnace installed in the floor of the living room.

On the 19th day of November, 1930, Mrs. Roy lighted the gas furnace in the living room, went through the kitchenette into the bedroom, lay down upon the bed, apparently for the purpose of reading, and while lying there, it is alleged, was overcome by carbon

monoxide gas, and died from the effects thereof.

The furnace was equipped with vent pipe which connected with the outside of the apartment for the purpose of permitting the escape of gas from the furnace. Prior to the 5th day of November, 1930, artificial gas was the fuel used in heating the apartments. On or about the 5th day of November, 1930, the defendant changed the artificial gas supply to said apartment and substituted natural gas, and at about the same date an agent of the company visited the apartments and adjusted the orifice of the furnace, rendered necessary by the substitution of natural for artificial gas as the fuel to be burned in the furnace.

The complaint then sets forth the plaintiff's cause of action as follows:

"VI. That said defendant Pacific Gas and Electric Company was in exclusive control of the plant distributing said natural gas during all the times it was so supplying said natural gas to the residents of the city of Vallejo and of the character, pressure and flow of said natural gas. That the only persons who had control of the flow of said gas were the said Fern Mildred Roy and said Pacific Gas and Electric Company, and that from the time Fern Mildred Roy turned on said gas and lighted said burner of said gas furnace until her death the said Pacific Gas and Electric Company had exclusive control of the flow of said gas as well as its character and pressure under which it was delivered.

"VII. That on said 19th day of November, 1930, and a short time before the death of Fern Mildred Roy, as herein alleged, she lighted said gas furnace in order to heat said apartment. That said gas furnace continued to burn from the time Fern Mildred Roy lighted the same until after her death when said gas furnace was extinguished by another person. That after Fern Mildred Roy had lighted said gas furnace in said living-room she went to her bedroom and lay down upon her bed for the purpose of reading. That while she was so lying upon her bed she was overcome by carbon monoxide gas and died therefrom.

"VIII. That said defendant, Pacific Gas and Electric Company, so negligently and carelessly supplied said natural gas to said apartment for use in said furnace so that said carbon monoxide gas was created by burning said natural gas through the burners as installed by said Pacific Gas and Electric

Company, in said gas furnace in said apartment. That said carbon monoxide gas was created to such an extent that said Fern Mildred Roy died from the effects thereof."

The deceased left her surviving a husband, the plaintiff herein, and a minor son named Clarence D. Roy, neither of whom were living with the deceased.

The order of the court granting a new trial, omitting the title, is in the following words: "It is ordered in the above entitled cause that the motion of the defendant, Pacific Gas and Electric Company, a corporation, for a new trial be, and the same is granted, and particularly upon the ground of insufficiency of the evidence to sustain the verdict." The verdict was in favor of the plaintiff, awarding damages in the sum of \$10,000.

It is admitted that the defendant was in sole charge of the plant furnishing natural gas to the apartment, and that on or about the 5th day of November, 1930, an agent of the company adjusted the orifice of the burners in the furnace so that natural gas could be burned therein. There is nothing in the testimony as to who installed the gas furnace, or that any one other than the tenant had charge or control thereof. As set forth in the sixth paragraph of the complaint, Fern Mildred Roy had control of the flow of gas in said furnace prior to the actual time of turning on the gas and lighting the same, and that thereafter the defendant had exclusive control of the flow of said gas, as well as its character, and pressure under which it was delivered. The eighth paragraph of the complaint charges the defendant with negligently and carelessly supplying natural gas through the burners as installed by the defendant, so that carbon monoxide gas was formed after the gas supply through the furnace had been lighted. There is nothing in the testimony showing installation of the burners in the gas furnace, by the defendant or any one else. All that the defendant had to do with the furnace was in adjusting a small contrivance called the "orifice," which regulates the quantity of air being added to the gas, or to the flame after the furnace is lighted. There does not appear to be anything in the pleadings or in the testimony to the effect that there was any negligence on the part of the agent of the defendant in adjusting the instrumentality called the "orifice." Under such circumstances the complaint showing by the sixth paragraph thereof that the deceased had control of the flow of gas in the furnace preceding the time of lighting the same, and in the absence of any allegation in the complaint as to any negli-

gence with reference thereto, we do not very well perceive how the doctrine of *res ipsa loquitur* has any application as to the furnace or any adjustment made thereof. The testimony is entirely wanting as to any negligence in relation to the furnace or any adjustment thereof. The court, in relation to this subject, instructed the jury as follows: "You are instructed that when the defendant, Pacific Gas and Electric Company, assumed the obligation of adjusting the orifice of the burner in said furnace, it assumed the obligation to provide skilled workmen to do such work and to use, in making the adjustment, the ordinary care and prudence that are required for such work that it had undertaken to do."

The testimony is silent as to whether the workman so furnished by the defendant was or was not sufficiently skilled in that line of work. Nor is there any allegation in the complaint that the workman so supplied by the defendant was either negligent or unskillful.

We do not need to enter into discussion or an analysis of the cases as to when the doctrine of *res ipsa loquitur* applies, as there does not appear to be any great divergence between counsel as to its having application in this case, particularly to the allegation as to negligence in controlling the flow of gas furnished to the apartment in question, and whether there is sufficient testimony in the record in relation thereto, as well as to the causes which led to the death of Mrs. Roy justifying the trial court in awarding her a new trial.

[1] The appellant's claim is based exclusively upon the theory that Mrs. Roy met her death through the inhaling of monoxide gas. While from the typewritten pages of the transcript it might appear that the preponderance of the testimony favored this theory, there are certain factors in relation thereto which may well have influenced the trial court in passing upon the defendant's motion for a new trial.

We have already described the relation of the respective rooms in the apartment. The testimony shows that a witness by the name of Beck, a policeman of the city of Vallejo, entered the apartment at about 7:45 p. m. on the 19th day of November, 1930; that the furnace was still burning; that either he or a sailor who accompanied him shut off the gas and extinguished the fire in the furnace; that at the time he entered the apartment the doors were closed and also the windows were all closed; that he did not notice any-

thing peculiar in the apartment save the excessive heat. An autopsy was had on the body of the deceased at about 9:30 of the same evening. The physician in charge of the autopsy stated that Mrs. Roy had been dead from eight, ten, to twelve hours. Thus, if the witness Beck entered the apartment at 7:45 p. m., the furnace had been burning approximately eight hours, if we take the ten-hour estimate of the length of time Mrs. Roy had been dead preceding the autopsy.

The witness Peterson, a physician called by the defendant, testified that any one entering a room where there was gas sufficient to cause the death of the deceased would become dizzy and faint, and "if they did not get out, they would probably die." The physician called by the plaintiff, and who made the autopsy which we have mentioned, testified that the deceased came to her death by inhaling monoxide gas. This witness testified that the autopsy revealed that the deceased had some heart trouble, and that there was a tumor of considerable size in one of the organs of her body. It does not appear that there was any examination made of the contents of the stomach. The autopsy physician based his conclusions upon a certain blood test.

There is also testimony to the effect that cyanide poisoning would produce similar appearances upon the body that were found upon the deceased, the difference between the two poisons being that by the use of cyanide poisoning retching and vomiting would follow. The physician called by the defendant also testified that it could not be ascertained whether Mrs. Roy came to her death by being poisoned without a chemical analysis of the stomach.

The foregoing testimony presented sufficient uncertainties as to the real cause of the death of Mrs. Roy as to call for the exercise of the discretion of the trial court who heard the witnesses, to determine whether Mrs. Roy's death had in fact been occasioned by monoxide poisoning.

[2] Before taking up the testimony as to the supply of gas, we may refer to the testimony of A. E. Englebright, division superintendent of the gas department, who testified that he had been told that an agent of the company called at the apartment occupied by the deceased, on the 18th or 19th of November, 1930, for the purpose of examining the adjustment of the gas furnace. Whether any readjustment was made is left uncertain. At least there is nothing in the record alleging or showing any negligence in relation

thereto. The supply of gas and the force used or the pressure under which the gas was furnished to the apartment is shown by the testimony of Louis N. Pechette, a witness for the defendant who had charge of the same. His testimony is to the effect that he had acted in that capacity for a trifle over fourteen years, and that a record was kept of the pressure under which the gas was furnished, to different consumers, at all times. This witness produced in court the charts taken of the pressure of gas as furnished to the apartment occupied by the deceased on November 19, 1930. One of the instruments for registering the gas pressure was situate about two and one-half blocks distant from the apartment occupied by the deceased. The pressure maintained by the company was approximately one-third of a pound or $9\frac{1}{2}$ inches to 10 inches of water column. The water column is explained as follows: A pound pressure would cause the water column to rise 27 inches. The pressure furnished was constant. It is the pressure exerted by the metal disc or covering in the tank or gasometer in which the gas is collected, and this pressure is shown by the testimony to be practically invariable, the variation being so slight as to be absolutely negligible. The chart, which is made by an instrument drawing lines, indicated that the gas pressure, on the 19th day of November, 1930, was as follows: Minimum, slightly less than 10 inches; maximum pressure, approximately 10.1 inches, being, in other words, approximately one-third of a pound. This chart was made at some distance from the apartment occupied by the deceased. The lines drawn by the instrument situate about two and one-half blocks from the apartment occupied by the deceased, showed a variation so slight that, to use the language of the witness, "it could not be picked off the chart."

This testimony was sufficient to justify the trial court in holding that the doctrine of *res ipsa loquitur*, imputing negligence to the defendant in its supply of gas to the apartment in question, had been fully met and refuted. If we assume that the doctrine of *res ipsa loquitur*, as contended for by the appellant, applies to the adjustment of the orifice controlling the quantity of air passing into and intermingling with the gas in order to produce a proper flame, a sufficient showing is otherwise made supporting the order granting a new trial, precluding any interference therewith on the grounds of an abuse of discretion by this court.

While the respondent has urged that the damages awarded were excessive, and cited

cases to the effect that where a new trial is granted upon that ground the court may examine the testimony to determine whether the award is excessive, those cases are not pertinent here, for the simple reason that the court specifically pointed out the grounds upon which it granted a new trial. We may call attention, however, to the fact that the testimony in this case is entirely wanting as to how long the deceased and the plaintiff in this action had been living separate and apart, or whether their separation was only temporary or permanent. Hence, the cases cited by respondent, where the separation appears to have been permanent or long continued, need not be considered.

In examining the instructions given by the trial court on the subject of damages, we have discovered no error, nor has any error in relation thereto been called to our attention. As the question of excessive damages is not determinative of this appeal, and as upon a new trial other damages may or may not be awarded, a discussion thereof here would serve no useful purpose, as what we have stated necessitates upholding the order of the trial court.

It is therefore ordered that the order of the trial court awarding the defendant a new trial be, and the same is hereby, affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



5 Cal.App.2d 241

ROBINSON v. FIDELITY & DEPOSIT CO.
OF MARYLAND.

MOREN v. FIDELITY & DEPOSIT CO. OF
MARYLAND.

Civ. 9493.

District Court of Appeal, First District,
Division 2, California.

March 14, 1935.

Hearing Denied by Supreme Court
May 13, 1935.

1. Judgment ⇨297

Court in action tried without jury on motion for new trial, after entry of judgment, could file amended findings and enter modified judgment without first vacating judgment already entered since modified judgment superseded prior judgment (Code Civ. Proc., § 662).

2. Appeal and error ⇨113(5)

Where court in action tried without jury on motion for new trial, after entry of judgment, filed amended findings and entered modified judgment without first vacating prior judgment, appeal from prior judgment was dismissed since modified judgment superseded prior judgment (Code Civ. Proc., § 662).

3. Appeal and error ⇨843(2)

In action on undertakings given in prior action for injunctive relief, whether attorney's fees were recoverable as damages was not before appellate court where trial court did not assess counsel fees as item of damage and other items found by trial court were sufficient to sustain judgment.

4. Injunction ⇨235

In action on undertakings which provided that surety would be liable if court finally decided that plaintiff, in injunction suit, was not entitled to restraining order or preliminary injunction, defendants in injunction suit held entitled to recover where permanent injunction was denied, notwithstanding absence of court order holding that plaintiff was not entitled to restraining order or preliminary injunction.

5. Injunction ⇨252(1)

Allowance of damages caused by issuance of a restraining order or preliminary injunction is controlled by equitable principles, persons restrained being entitled to such damages as are the necessary and proximate result of such restraint.

6. Injunction ⇨252(4)

In action by contractor and owner, who were restrained for seven years from constructing an apartment house, on undertakings furnished to secure temporary restraining order and preliminary injunction, assessment of damages to contractor on restraining order undertaking, and to contractor and builder on injunction undertaking for loss of use and occupation of premises, loss of expenditures for permits, materials, supplies, labor, and profits under contract held not improper as too remote or speculative.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Separate actions by L. B. Robinson and G. Moren against the Fidelity & Deposit Company of Maryland. From a judgment entered December 14, 1933, in favor of plaintiffs, which was modified by a judgment entered on March 6, 1934, defendant appeals.

Appeal from judgment entered on December 14, 1933, dismissed and judgment entered March 6, 1934, affirmed.

Sullivan, Roche, Johnson & Barry, of San Francisco, for appellant.

Peter tum Suden and Richard tum Suden, both of San Francisco, for respondents.

SPENCE, Justice.

The above-entitled actions were brought to recover upon two undertakings which were furnished in an action for injunctive relief entitled *London v. Robinson and Moren*. One of the undertakings in the sum of \$1,000 was furnished upon the granting of a restraining order and the other undertaking in the sum of \$3,000 was furnished upon the granting of a preliminary injunction. In said action for injunctive relief, a permanent injunction was thereafter granted but the decision was reversed on appeal. *London v. Robinson et al.*, 94 Cal. App. 774, 271 P. 921. Upon a second trial of that action, a nonsuit was granted and that decision was affirmed on appeal. *London v. Robinson et al.*, 122 Cal. App. 232, 9 P.(2d) 880. The owner of the premises, L. B. Robinson, and the contractor, G. Moren, then filed separate actions seeking to recover damages against the surety on the two undertakings. Said actions were consolidated for the purpose of trial and the cause was tried before the court sitting without a jury. On December 14, 1933, a judgment was entered in favor of plaintiffs upon findings of fact and conclusions of law theretofore filed. Upon motion for a new trial, said motion was denied, but the trial court filed "Findings of Fact and Conclusions of Law as amended on Motion for New Trial," and entered a modified judgment on March 6, 1934, based upon said amended findings. By said last-mentioned judgment, plaintiff G. Moren recovered the sum of \$653.13 upon the undertaking in the sum of \$1,000, and plaintiffs G. Moren and L. B. Robinson jointly recovered a judgment for the full amount upon the undertaking in the sum of \$3,000. Defendant has appealed from the judgment entered on December 14, 1933, and also from the judgment entered on March 6, 1934.

[1, 2] One of the points urged on this appeal is that the trial court erred upon the motion for new trial in filing amended findings and entering a modified judgment without first vacating the judgment entered on December 14, 1933. We are of the opinion, however, that when the trial court filed its amended findings and modified judgment up-

on denying the motion for new trial, it acted in accordance with the provisions of section 662 of the Code of Civil Procedure and that the modified judgment superseded the judgment of December 14, 1933. The appeal from said judgment of December 14, 1933, should therefore be dismissed.

The injunction suit was commenced on August 13, 1925, and a restraining order was issued at that time restraining Robinson and Moren from constructing an apartment house on Robinson's property. The undertaking given to obtain said restraining order provided for the payment of the damages not exceeding \$1,000 sustained "by reason of the restraining order if the said Superior Court finally decides that the said plaintiff was not entitled thereto." Said restraining order was in effect until the issuance of the preliminary injunction on September 21, 1925. The undertaking given to obtain the issuance of the preliminary injunction provided for the payment of damages not exceeding \$3,000 sustained "by reason of said injunction, if the court finally decide that the plaintiff was not entitled thereto." At the time of the commencement of the injunction suit, all preparations had been made for the construction of an apartment house on the premises and work had been started. That litigation was finally concluded seven years later upon the affirmation of a nonsuit granted in favor of the defendants upon the second trial. *London v. Robinson et al.*, 122 Cal. App. 232, 9 P.(2d) 880. In the present actions, plaintiffs alleged that it was "finally adjudged" in the injunction suit that the plaintiff therein was not entitled to the temporary restraining order or the preliminary injunction. Plaintiffs herein further alleged damages consisting of necessary counsel fees expended, loss of use and occupation of the premises, loss of expenditures for permits, materials, supplies, and labor, and loss of profits to the contractor under his contract for the construction. These alleged items of damage far exceeded the amount of the undertakings. In the modified judgment, the trial court allowed no recovery for counsel fees expended by either plaintiff nor for any alleged damage of the plaintiff Robinson on the undertaking given upon the issuance of the restraining order. The judgment upon said undertaking was limited to the items of damage other than counsel fees found to have been suffered by plaintiff Moren by reason of said restraining order. Recovery was allowed to both plaintiffs jointly in the full sum of \$3,000 upon the undertaking given upon the issu-

ance of the preliminary injunction. The trial court found plaintiffs' damages, including counsel fees, exceeded said sum of \$3,000, but the items of damage other than counsel fees were sufficient to make up the amount awarded which was the amount specified in the undertaking.

[3] Appellant's contentions appear to be that neither of the respondents was entitled to recover upon either of the undertakings, and that even assuming that respondents were entitled to recover, they were not entitled to the items of damage awarded. In support of these contentions appellant cites numerous cases, many of which deal solely with the question of the recovery of counsel fees as an item of damage. *San Diego Water Co. v. Steamship Co.*, 101 Cal. 216, 35 P. 651; *Curtiss v. Bachman*, 110 Cal. 433, 42 P. 910, 52 Am. St. Rep. 111; *Lambert v. Haskell*, 80 Cal. 611, 22 P. 327; *Mitchell v. Hawley*, 79 Cal. 301, 21 P. 833; *Bustamente v. Stewart*, 55 Cal. 115; *Webber v. Wilcox*, 45 Cal. 301; *Warden v. Choate*, 33 Cal. App. 354, 165 P. 36. From what has been said above, it appears that even if the counsel fees are eliminated from consideration, the other items of damage found by the trial court were sufficient to sustain the judgment and we need not therefore discuss what counsel fees, if any, might properly have been awarded as part of the damage sustained by reason of the issuance of the restraining order and the preliminary injunction.

[4] Appellant's main contention is that both the pleadings and the evidence were insufficient to justify any recovery whatever by respondents. Appellant therefore contends that its motion for judgment on the pleadings should have been granted. We find no merit in these contentions. They are based upon the theory that in the injunction suit the court did not "finally decide" that the plaintiff was not entitled to the restraining order and the preliminary injunction. In other words, appellant takes the position that regardless of the fact that in the action brought solely to obtain injunctive relief the court finally decided that the plaintiff was not entitled to a permanent injunction, there was no liability on the undertakings unless the court decided, on a motion such as one to dissolve the restraining order or temporary injunction, that the plain-

tiff was not entitled to the restraining order or the preliminary injunction. We believe appellant seeks to place too narrow a construction upon the wording of the undertakings. When it was finally decided that the plaintiff in the injunction suit was not entitled to a permanent injunction, it was in effect an adjudication that said plaintiff was not entitled to any injunctive relief. It therefore constituted an adjudication upon a full hearing upon the merits that the plaintiff was not entitled to place the defendants under restraint at any time by either a restraining order or a preliminary injunction. We therefore conclude that the pleadings and proof were sufficient when they showed that it was finally decided that the permanent injunction should be denied.

[5, 6] Appellant also contends that the damages allowed were remote and speculative. We believe this contention to be likewise without merit. While the damages caused by the issuance of a restraining order or preliminary injunction are often difficult to measure accurately, it has been said that "the allowance of such damage is controlled by equitable principles, and should furnish just and reasonable compensation for the loss sustained." *Moore v. Maryland Casualty Co.*, 100 Cal. App. 658, 663, 280 P. 1008, 1010. In *Rice v. Cook*, 92 Cal. 144, on page 149, 28 P. 219, 220, the court quoted from *High on Injunctions* (3d Ed.), § 1673, where it is said that in such cases " * * * the courts are not governed by arbitrary rules, but proceed upon equitable principles; the defendant being entitled to such damages as are the necessary and proximate result of such deprivation." See, also, *Draffen v. United States F. & G. Co.*, 217 Cal. 43, 46, 17 P.(2d) 121. A review of the evidence here leads us to the conclusion that the trial court did not award any damages which were remote or speculative, but merely gave "just and reasonable compensation for the loss sustained." It may be stated that it is not claimed that the damages awarded were unreasonable or excessive.

The appeal from the judgment entered on December 14, 1933, is dismissed. The judgment entered on March 6, 1934, is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

5 Cal.App.2d 175

BARNETT et al. v. UNITED OIL CO. et al.
Civ. 1528.

District Court of Appeal, Fourth District,
California.

March 7, 1935.

1. Appeal and error ⇨965

Venue ⇨68

Burden of making satisfactory showing that convenience of witnesses demands change of place of trial is on party moving for such change, and order denying the motion must stand unless it is apparent from movant's showing that court arbitrarily abused discretion.

2. Venue ⇨52(2)

In passing on motion for change of venue for convenience of witnesses, convenience of employees of parties to the action need not be consulted.

3. Venue ⇨72

Where notice of motion for change of venue for convenience of witnesses specified motion would be based on records and files of action in addition to supporting affidavit, trial court *held* justified in considering various allegations contained in the answer in passing on motion.

4. Venue ⇨52(2)

Where defendant in suit for accounting for royalties from oil and gas lease had, in its answer, attacked the complaint for non-joinder of receiver of a corporation which was alleged to be parent corporation of defendant and codefendant, the receiver allegedly being a necessary party, trial court, in passing on defendant's motion for change of venue for convenience of witnesses, *held* not to have abused discretion in refusing to consider alleged inconvenience of witnesses described as employees of such receiver.

5. Venue ⇨70

In action against alleged assignee of oil and gas lease for accounting for royalties on sale of gasoline and dry gas derived from natural gas, defendant's affidavit in support of motion for change of venue for convenience of witnesses *held* not to show that expert witness had personal knowledge of facts in case, so that trial court was not required to consider such witness' convenience.

Affidavit averred that witness had had wide experience in processing and treatment of natural gas on behalf of land-owners and lessees of oil and gas producing properties and would testify concerning market value of natural gas at casing head of the wells and the common and general practices of natural gas treating industry concerning basis on which

natural gas is treated by gasoline companies, and would also testify concerning cost of manufacturing gasoline and dry gas from natural gas.

6. Venue ⇨52(3)

Trial court, in passing on motion for change of venue for convenience of witnesses, is not required to consider convenience of expert witness unless there is showing that such expert has knowledge of facts involved in the action.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Henry Barnett and another against the United Oil Company and others. From an order denying named defendant's motion for a change of venue, such defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles, and Forgy, Reinhaus & Forgy, of Santa Ana (by Bruce Wallace, of Los Angeles), for appellant.

Holton & Schuelke, of Whittier, and Rutan & Mize, of Santa Ana (by Walter E. Schuelke, of Whittier), for respondents.

JENNINGS, Justice.

The United Oil Company, a defendant in the above-entitled action, appeals from an order denying its motion for a change of venue from Orange county, where the action was instituted, to the county of Los Angeles. The notice of motion specified that the ground therefor would be the convenience of witnesses, and that it would be based upon the records and files of the action and upon an affidavit attached to said notice. At the time the motion was heard the files of the action comprised the verified complaint of the plaintiffs and a verified answer filed by the above-named defendant. In addition to the affidavit which was presented by the defendant in support of the motion a counter affidavit in opposition thereto was filed by the plaintiffs.

It is conceded that a trial court in passing upon a motion of this character is vested with a wide discretion, and that a reviewing court is justified in reversing the order only when it is made to appear that the trial court has committed a plain abuse of such discretion. It is, however, contended that the record herein sufficiently shows an abuse of discretion in the denial of the motion and that the order should therefore be reversed. Proper consideration of the contention thus advanced

requires some reference to the pleadings, and demands careful analysis of the affidavit filed in support of the motion.

The complaint is entitled, "complaint for Accounting of Royalties from Oil and Gas Lease." It purports to state a cause of action against the appellant as assignee of the original lessees under an oil and gas lease executed by the predecessors in interest of respondents for an unknown sum of money claimed to be due as royalties from the sale of gasoline and resulting dry gas derived from natural gas produced from the leased premises. The Signal Hill Gasoline Company is joined as a party defendant to the action under allegations that it was, during part of the time for which an accounting is demanded, under joint ownership and control with the appellant. The prayer of the complaint is that appellant be required to render a true and correct accounting to respondents with respect to all natural gas, gasoline, gas, and other hydrocarbon substances (except oil) produced from the leased premises, and in particular that appellant be required to show fully and accurately the amount of gasoline produced and the actual cost of extracting gasoline from the natural gas and the price obtained from the sale of such gasoline, and that from such accounting the amount of money due from appellant to respondents as royalties be determined and that judgment for such amount be rendered in favor of respondents.

The principal defense alleged by the answer is that appellant is not the assignee of the lease described in the complaint, but that it is the assignee of a sublease executed by an assignee of the original lessee and is therefore not bound by the provisions of the original lease, but is only accountable in accordance with the terms of the sublease. It is, however, further alleged that appellant has voluntarily accounted correctly to respondents for all amounts due, and has regularly paid such amounts. The answer contains a specific denial that appellant and its codefendant were at any time for which an accounting is demanded under joint ownership and control. A number of special defenses are also pleaded. One of these is entitled to particular mention because of its bearing upon the question of the convenience of certain witnesses named and described in appellant's supporting affidavit.

This special defense is based upon an alleged defectiveness in the complaint because of the nonjoinder of a necessary party defendant to the action. The material allegation of the special defense in this regard may be epit-

omized as follows: That the complaint is defective for the reason that there has been omitted therefrom the name of a defendant essential to a complete and final determination of the issues presented by the complaint and answer, to wit, William C. McDuffie, as receiver of the Richfield Oil Company of California, who is a necessary party to the action for the reason that appellant and its codefendant, Signal Hill Gasoline Company, are subsidiary corporations of the Richfield Oil Company of California, for which latter corporation the aforesaid William C. McDuffie was appointed receiver on January 31, 1931, by the United States District Court for the Southern District of California in a certain action pending before said court, and the said receiver was ordered and directed to operate all of the properties, inter alia, of appellant and its codefendant jointly and as a unit with all other properties of the receivership estate of the Richfield Oil Company of California. It is further alleged that the subleasehold estate owned by appellant was, on the date on which the receiver was appointed, property of appellant, and that in obedience to the aforementioned order of the United States District Court, the receiver has at all times subsequent thereto maintained, preserved, and operated said subleasehold estate of appellant and has received all proceeds derived from its operation and has paid all expenses incurred in its operation; such proceeds being placed in and such expenditures for operation being taken from the joint assets of the receivership estate of the Richfield Oil Company of California and of its subsidiaries, among whom are appellant and its codefendant. It is further alleged that by reason of the operation of said subleasehold estate of appellant by the aforementioned receiver any wrongful acts in connection therewith which may have occurred subsequent to the appointment of the receiver have been the acts of the receiver and not the acts of appellant or its codefendant and the said receiver is therefore primarily and ultimately liable for such acts, and a complete and final determination of the issues raised by the pleadings cannot be had unless the said receiver is made a party to the action.

[1] Appellant particularly maintains that the counter affidavit filed by respondents in opposition to the motion was entirely insufficient to warrant the trial court in retaining jurisdiction of the action and in denying the motion for change of venue. This may here be conceded. The concession does not, however, alone justify reversal of the order since it is appellant which sought a change of

venue on the ground of convenience of witnesses. Upon appellant, therefore, was imposed the burden of making a satisfactory showing that the convenience of witnesses demanded a change of place of trial and unless it is apparent from such showing that the court arbitrarily abused its discretion in denying the motion the order must stand.

[2-4] Appellant's supporting affidavit alleges that the facts which it expects to prove will be established by the testimony of nine witnesses who are named and described in the affidavit. One of these witnesses is the affiant, who is stated to be an active officer of the appellant. Two other witnesses are shown to be employed in some capacity by appellant's codefendant Signal Hill Gasoline Company. We do not understand that it is here contended that the trial court in passing upon the motion was required to consider the convenience of these three witnesses. Such contention, if made, would be unavailing, since the rule is well settled that the convenience of employees of a party to an action need not be consulted in passing upon a motion for change of venue. *Security Investment Co. v. Gifford*, 179 Cal. 277, 278, 176 P. 444, 445. Of the remaining six witnesses mentioned in the affidavit, five of them are shown to be employed by the receiver of Richfield Oil Company of California. The last-named corporation is not a party to the action. However, in the counter affidavit which was filed by respondents it is alleged that appellant and its codefendant are admitted by their answer on file to be subsidiary corporations of the Richfield Oil Company of California and are therein alleged to be under the direct supervision of the last-mentioned corporation. The allegation of the answer to which reference is thus made has heretofore been outlined. Since the notice of motion specified that it would be based on the records and files of the action in addition to the supporting affidavit, the trial court was justified in considering the various allegations contained in the answer. This pleading contains a direct attack upon the complaint on account of the misjoinder of a party defendant who is specifically alleged to be a necessary party to the action. It is therein explicitly alleged that appellant and its codefendant are subsidiary corporations of the Richfield Oil Company of California and that a receiver has been appointed for this last-named corporation who was ordered and directed to operate all properties of the appellant and its codefendant jointly and as a unit with all other properties of the receivership estate aforesaid. It is further specifical-

ly alleged that the said receiver has, subsequent to his appointment, operated the property as to which an accounting is here sought and received all proceeds derived from such operation and has paid all costs of said operation from the joint assets of the receivership estate of the Richfield Oil Company of California and its subsidiaries. It is our conclusion that the trial court may not be convicted of an abuse of discretion in having refused to consider the alleged inconvenience of the five witnesses who are described as employees of a person who is thus so clearly and emphatically declared to be a necessary party to the action. We entertain the opinion that the above-mentioned rule which renders it unnecessary for the trial court to consult the convenience of employees of a party to an action may properly be extended to include employees of one who is specifically asserted to be a necessary party and for whose nonjoinder the complaint is directly attacked.

[5, 6] The remaining witness mentioned in the affidavit filed in support of the motion for change of venue is T. L. Taggart. As to this witness the showing made by the affidavit is as follows: "T. L. Taggart is manager of the Contract Department of Standard Oil Company. Mr. Taggart is a resident of the city of Palos Verdes, Los Angeles County, and has had wide experience in the processing and treatment of natural gas on behalf of landowners and lessees of oil and gas producing properties. Mr. Taggart will testify concerning the market value of natural gas at the casing head of the wells and the common and general practices of the natural gas treating industry concerning the basis on which natural gas is treated by gasoline companies. Mr. Taggart will also testify concerning the cost of manufacturing gasoline and dry gas from natural gas."

The question of whether or not the trial court was entitled to consider this witness' convenience in passing on the motion was raised by the counter affidavit filed by respondents wherein it is alleged that: "It is evident that defendants intend to qualify T. L. Taggart as an expert witness; that it is not alleged in said affidavit that said T. L. Taggart has any personal knowledge of the facts in this cause."

The rule with respect to the convenience of expert witnesses is stated in *Security Investment Co. v. Gifford*, supra, as follows: "Neither the convenience of experts nor of employees should be considered in determining the question of the convenience of witnesses, except where the experts also have personal

knowledge of the facts upon which their testimony is to be based."

Appellant does not here contend that the above-named witness will not be called to testify as an expert, but maintains that the witness comes within the stated exception to the general rule that the convenience of expert witnesses is not to be considered. In other words, it is contended that the affidavit filed by appellant in support of the motion shows that the witness has personal knowledge of the facts upon which his testimony will be based. This contention is entitled to consideration. The showing made by the affidavit is: First, that the witness has had wide experience in the processing and treatment of natural gas on behalf of landowners and lessees of oil and gas producing properties; second, that he will testify concerning the market value of natural gas at the casing head of the wells and the common and general practices of the natural gas treating industry concerning the basis on which natural gas is treated by gasoline companies; third, that he will also testify concerning the cost of manufacturing gasoline and dry gas from natural gas. The only intimation that the witness has any personal knowledge of the particular facts involved in this action arises from the use of the article "the" qualifying the word "wells" in the phrase "of the wells." It may be argued that the inclusion of the article limits the phrase to the particular wells mentioned in the complaint, and that therefore the affidavit contains a sufficient showing of personal knowledge of the wells mentioned in the complaint to bring the witness within the exception. The argument is ingenious, but lacks impressiveness. A reading of the entire showing made with respect to this witness impels the conclusion that it is not suggested that he has any personal knowledge regarding the particular wells which are most generally referred to in the complaint, but that his knowledge is a general knowledge based on his wide experience in the processing and treatment of natural gas, and that the testimony which he will give will relate to the value of natural gas at the casing head of wells generally.

It is, however, urged that, irrespective of any question of the insufficiency of the showing as to personal knowledge possessed by the witness as to the particular facts involved in this action, it does appear from the language of the affidavit that the witness possesses personal knowledge of the facts upon which his testimony will be based. It must

be observed that it is declared that the testimony of this witness will relate to three matters. These are: First, the market value of natural gas at the casing head of wells; second, the general practices of the natural gas treating industry concerning the basis on which natural gas is treated by gasoline companies; third, the cost of manufacturing gasoline and dry gas from natural gas. The foundation for this testimony is the wide experience which the witness has had in the processing and treatment of natural gas. The statement that the witness has had wide experience along the line mentioned necessarily carries the implication that he is familiar with and has personal knowledge of the details which form a part of the industry of treating natural gas. Unquestionably, it may be conceded that the affidavit shows that the witness possesses personal knowledge of the details of the industry derived from personal observation and training. But we fail to discover any showing that the witness has any personal knowledge of the facts which are involved in this action. That this is the test to be applied in giving consideration to the alleged convenience of an expert witness is announced in *Wrin v. Ohlandt*, 213 Cal. 158, 160, 1 P.(2d) 991 where it is said: "Furthermore, there is no showing that this remaining witness has any personal knowledge of any of the facts *in the case*. If called, he will testify simply as an expert witness as to the value of the services rendered by the assignors of the plaintiff. In the case of *Security Inv. Co. v. Gifford*, 179 Cal. 277, 176 P. 444, this court held that the convenience of expert witnesses having no personal knowledge of any facts in the case should not be considered in determining the question of the convenience of witnesses." (Italics ours.) So here we may say that this witness, if called, will testify simply as an expert as to the value of natural gas at the casing head of wells from which it is extracted. Such testimony involves no personal knowledge of the particular facts of this action.

It is therefore our conclusion that appellant has failed to demonstrate that the trial court was guilty of an abuse of the wide discretion with which it was invested in refusing to grant the motion for change of venue on the ground stated.

The order from which this appeal has been taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

5 Cal.App.2d 444

AGOURE et al. v. SPINKS REALTY

CO. et al.

Civ. 5261.

District Court of Appeal, Third District,
California.

March 22, 1935.

1. Appeal and error ☞1011(1)

Trial court's finding upon conflicting evidence that purchase of property at foreclosure sale and resale to mortgagor by corporation controlled by heirs of deceased mortgagee was not for purpose of evading usury law held conclusive.

2. Appeal and error ☞994(3)

Appellate court cannot determine whether credence shall be given particular testimony.

3. Appeal and error ☞1010(1)

To warrant appellate court in determining that there is no conflict in evidence because of inherent improbability, there must exist either physical impossibility of evidence being true, or such state of facts so clearly apparent that nothing need be assumed nor any inference drawn to convince ordinary mind of falsity of story.

4. Trial ☞93

Attorney's statement at conclusion of trial, that there were objections made on both sides and that ruling was made reserving privilege of counsel to move to strike out testimony, and that attorney did not deem those matters of such importance in respect to testimony, and that he did not know whether court desired to pay attention to them or not, was not specific motion to strike out testimony complained of, and, in absence of such motion, objection was waived.

5. Appeal and error ☞1041(2)

Refusal to permit amendment to complaint to show that alleged usurious scheme provided for payment of bonus of \$3,000 and 10 per cent. interest instead of \$5,000 and 8 per cent. interest, as alleged in complaint, held not prejudicial, where case was tried on its merits, and variance between allegations and proof as to amount of alleged bonus was not a factor in ultimate determination of cause.

Appeal from Superior Court, Los Angeles County; Michael J. Roche, Judge.

Action by Lester P. Agoure and his wife against the Spinks Realty Company and others. From a judgment, plaintiffs appeal.

Affirmed.

Frances D. Adams and Robert Clifton, both of Los Angeles, for appellants.

Barker, Smiley & Keithly, of Los Angeles, for respondents.

WOODWARD, Justice pro tem., delivered the opinion of the court.

Plaintiffs appeal from a judgment for defendants in an action to enjoin the sale of real property pursuant to the terms of a deed of trust, and to recover money alleged to have been paid as usurious interest.

Certain acts of the parties culminating in the present controversy are not in dispute, and may be chronologically outlined as follows: On May 16, 1923, the plaintiffs, Lester P. Agoure and Frances Lea Agoure, husband and wife, borrowed \$20,000 from Mosely E. Spinks, giving their promissory note therefor secured by a deed of trust on certain real property situated in Los Angeles county. Three years thereafter the note matured and, by mutual consent, the due date thereof was extended until November 16, 1928. On November 14, 1929, the plaintiffs being in default both as to principal and interest, Mosely E. Spinks recorded a notice of default. His death occurred three days later, and the ownership of the note and deed of trust passed to his family, subject to administration of the estate. Decedent left a will wherein Clara B. Spinks, surviving widow, was named as executrix, and Andrew M. Spinks, Leon P. Spinks, and John W. Spinks, surviving sons, as executors. The widow declined to act, and by reason thereof the responsibility of probating the estate devolved upon the sons who, in due time, proceeded to complete the foreclosure initiated by their father.

On March 18, 1930, the trustee sold the property in the usual manner, and it was bid in by the Spinks Realty Company, a family corporation previously organized by decedent, for \$24,914.93, which said amount was the aggregate of principal, accrued interest, certain advances, and costs of sale. A check for the full amount of the bid was issued by the realty company, delivered to the trustee, and, in due time, credited to the funds of the estate. On the same day but after the foreclosure sale the Spinks Realty Company sold the property back to plaintiffs for \$30,000, taking their promissory note, secured by a deed of trust on said property, for the full purchase price. The note was to mature on March 18, 1933, and bore interest at the rate of 8 per cent. per annum. Plaintiffs thereafter defaulted in the installment of interest due on De-

ember 18, 1930, whereupon the Spinks Realty Company gave notice that, in accordance with the terms of the note, it had elected to declare all sums secured by said deed of trust to be immediately due, and proceeded to take the customary steps for the sale of plaintiffs' property. Plaintiffs then commenced the present action, alleging in their complaint that the resale of the property to them by the Spinks corporation was an unlawful subterfuge; the real purpose being to renew the original loan at a usurious rate of interest. They prayed for a money judgment of \$3,600, or treble the sum of their installment payments to date; they also sought and, on July 9, 1931, obtained an injunction pendente lite.

It may be observed parenthetically that the procedural regularity of the completed foreclosure was not attacked at the trial, the court having been called upon to determine but one issue of fact, namely, whether the resale was a bona fide transaction, or merely a prophylactic attempt by the Spinks brothers to avoid future complications. On the issue of fact thus presented, the court found against plaintiffs' contentions, holding that the resale was legitimate and regular in all respects; that after the foreclosure had been completed the "defendant Spinks Realty Company offered to sell and transfer the property acquired by it at said sale to plaintiff Lester P. Agoure at and for the price of \$30,000, which was then and there accepted by said Lester P. Agoure, and it was to evidence such transaction, to-wit: a sale of said real property, that said agreement constituting the escrow instruction, Exhibit A, attached to the complaint, was made, and it was in consummation of said purchase and sale that said \$30,000 promissory note was executed."

An exhaustive discussion of the evidence is not necessary; a résumé thereof being sufficient. Generally speaking, the plaintiffs charged that there had been a categorical agreement with the three Spinks brothers for a renewal of the \$20,000 obligation under the guise of a foreclosure and resale of the property. Plaintiff Lester P. Agoure testified that, after learning of the notice of breach and the subsequent death of Mosely E. Spinks, he conferred with his attorney, Mr. Taggart, and then, accompanied by Mrs. Agoure, went to the office of the Spinks Realty Company to see if the sale could not be postponed. This was about the middle of February, 1930; Mrs. Agoure, the witness declared, importuned the Spinks brothers for additional time, explaining that her husband's business was improving and they hoped to get their affairs

straightened out; that Leon Spinks, who acted as spokesman, replied that the court had ordered his father's estate settled, and that the sale could not be postponed. Some weeks later, the witness continued, a second meeting was held at which time the attorney, Mr. Taggart, urged the parties to come to an amicable understanding. On this occasion the witness, so he testified, bluntly requested Leon Spinks to refinance the loan, whereupon the latter replied, "Well, we can refinance you but it will cost you money." Mrs. Agoure then asked as to the amount, and Leon Spinks declared, "We will refinance you for \$3,000 and ten per cent interest." The witness claimed that at this juncture Spinks turned to his two brothers and remarked, "We have to be careful of the usury end of it; we will have to see our attorney." The alleged details of the refinancing scheme were not worked out at this time. Several days before the sale by the trustee, the witness went on to say, the parties met for the third time, and on this occasion Leon Spinks informed plaintiffs that the Spinks corporation would bid in the property and resell it to them. The witness said he asked "for some paper to that effect," but that this was refused. The witness said further that on March 18th he and Mrs. Agoure attended the sale where "Mr. Mowry, the trust officer, read off the descriptions and the indebtedness and he asked what he was bid, and John Spinks walked up with some figures written on a paper and handed it to Mr. Mowry; * * * there may have been some words that I could not hear, but Mr. Mowry picked up his books and Leon said to me, 'Let's go upstairs and finish this up.'" The witness then asserted that after the sale had been completed he went immediately to the escrow department of the Title Insurance & Trust Company where Leon Spinks dictated escrow instructions, and where said instructions were signed by the respective parties. On cross-examination the witness admitted there never had been any suggestion of a \$5,000 bonus to Spinks brothers as meticulously set forth in the complaint, nor did he have any conversation concerning the transaction with Spinks brothers on March 18th, before the hour of sale, as also alleged in the complaint. The witness admitted too that, despite the alleged oral agreement with the defendants, he made many futile efforts to have other brokers refinance him. Mrs. Agoure corroborated her husband's testimony in many of its details.

The defendants emphatically denied that they had ever agreed, directly or indirectly, to sell the property to the Agoures until aft-

or the foreclosure. Leon P. Spinks testified that Mr. and Mrs. Agoures called at his office and asked him to bid in the property and sell it back to them; that they said they had interviewed a number of loan brokers and could not borrow the amount of money needed without paying a large bonus; that they preferred to deal with people they knew and were willing for Spinks brothers to write their own "ticket." The witness declared he advised them that he would take up the matter with his attorney and when they returned several days later "I told them you (referring to his attorney) advised me not to negotiate with anybody about the property before the sale; that it would be embarrassing to me; but if by any chance we should bid the property in, we had a perfect right to negotiate with anybody we saw fit, to sell them the property; * * * I did not say that I would go prepared to care for the sale, prepared to bid the property in, no matter what other bids there might be; or anything to that effect, and neither of my brothers, Andrew M. or John W. made any such statement; I did not say that the sale that was to take place on the 18th day of March, 1930, would be only a wash sale, or anything of that kind; nor did I say, 'you will get your property back all right,' or words to that effect; I did not say they could trust me and I would bid it in for them and make them a new loan, and not anything was said at this conversation about extending the old loan, or renewing any loan." The witness then detailed a conversation he had had with plaintiffs' attorney, Mr. Taggart: "Mr. Taggart rang me up and said, 'I understand you and the Agoures have not gotten together on the thing,' * * * and I said, 'No, we don't want that property,' and he said, 'Why don't you sell it back to them after the sale?' And I said, 'I don't think the Agoures are entitled to any consideration; they are two years behind in interest; they worried father a lot over the matter—and they haven't taken care—they haven't taken care or the trouble to renew their paper, and I see no reason to do so.' * * * I had a further talk with Mr. Taggart on Monday, he rang me up and asked what you (referring to the attorney for Spinks brothers) said, and I said you warned me about having any conversation with him or anybody else in the matter, and he said, 'Suppose you bid it in, what profit do you want?' and I said, 'I won't talk to you or anybody else about the matter; you will have to take your chances about the matter as to what I will do or won't do'; that was on Monday, the day before the sale." The witness then went on to testify that after the sale

Taggart requested him to meet the Agoures and he consented to do so; that at this meeting he and his brothers decided that if they did not sell to the Agoures they probably would be unable to sell at all, as there had been no other bidders for the property. Spinks declared that at first he did not know what price to charge for the land, as the question of income tax would have to be taken into consideration; but that after the sale and while the Agoures were waiting he discussed the matter with his brothers and they decided to offer the property for \$30,000. Agoures, he said, expressed himself as being satisfied with the price. The witness also testified that the value of the property, although unsalable at the time, was \$72,783. The witnesses, John W. and Andrew M. Spinks, gave substantially the same testimony as to conversations with the Agoures. Taggart, called by both sides, testified while a witness for the defendants that he had endeavored prior to the sale to obtain promises from his brother-in-law, Leon Spinks, but had failed; that he had done all he could with Spinks brothers "without getting into a quarrel with them," but they refused to commit themselves.

[1-3] It thus appears that the testimony was in conflict. This is not denied, but appellants advance the rather tenuous argument that when the defendants' evidence is fairly compared with their own the conflict becomes more imaginary than real. In an attempt to substantiate this claim, appellants point out that the physical acts of the parties, as differentiated from the nebulous question of motive, show the resale to have been but a thin disguise for a usurious scheme; or, in other words, that the testimony of the defendants was inherently improbable, and therefore unworthy of credence. It may be, as urged by appellants, that the acts of the parties speak more convincingly than the explanations and denials of defendants, and that the transaction was but a smug scheme on the part of Spinks brothers to evade the usury law. But the trial court, which heard the witnesses and observed their demeanor on the stand, reached the opposite conclusion. And we cannot say, as a matter of law, that the evidence was insufficient to justify that conclusion. It is, of course, not the function of appellate courts to determine what credence shall be given particular testimony. To warrant an appellate court in determining that there is no conflict in the evidence because of inherent improbability "there must exist either a physical impossibility of the evidence being true, or such a state of facts so

clearly apparent that nothing need be assumed nor any inference drawn to convince the ordinary mind of the falsity of the story." *Powell v. Powell*, 40 Cal. App. 155. When there is competent evidence to sustain the findings of the trial court, as in the present case, such findings will not be disturbed on appeal. This rule is too well known to require the citation of authorities.

[4] Appellants complain of the court's ruling in permitting the witness Taggart to testify as to conversations had with Leon Spinks without the presence of either of the plaintiffs. An objection was interposed on the ground that the witness had not been shown to possess the authority to speak for plaintiffs, but it was apparently withdrawn later, Mr. Boardman (plaintiffs' counsel) declaring, "It is certainly objectionable, but if the court expresses a wish to go into the matter, I am not going to insist on the objection." The witness then testified to certain conversations; also that he had advised Agoure of his negotiations with Spinks brothers and his failure to obtain any promises from them. A similar and proper objection was made when Leon Spinks was asked as to a telephone conversation between himself and the witness Taggart. The court at first sustained the objection, but later, with the apparent approval of plaintiffs, admitted the testimony subject to a motion to strike out. At the conclusion of the trial Mr. Boardman said to the court: "There are some matters of procedure remaining so far as the parties are concerned. There were objections made on both sides, and the ruling was made reserving the privilege of counsel to move to strike out testimony if they should so desire; and from my point I don't regard those matters of such importance in respect to the testimony that was elicited. I don't know if Your Honor desires to pay attention to them or not." This was not a specific motion to strike out the testimony now complained of; and, in the absence of such motion, the objection was waived. In *re Estate of Wempe*, 185 Cal. 557, 197 P. 949.

[5] Lastly, appellants complain that the court erred in not permitting them to amend so as to show that the alleged usurious scheme provided for the payment of a bonus of \$3,000 and 10 per cent. interest instead of \$5,000 and 8 per cent. interest, as alleged in the complaint. While the court might properly have permitted the amendment, we see no prejudicial error in its refusal so to do. The case was tried on its merits and the variance be-

tween the allegations of pleadings and the proof, as to the amount of the alleged bonus, seems not to have been a factor in the ultimate determination of the cause.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



5 Cal.App.2d 412

**CENTRAL NAT. BANK OF OAKLAND v.
PECK.**
Civ. 9524.

District Court of Appeal, First District,
Division 2, California.

March 21, 1935.

1. Appeal and error ⇨766

Noncompliance with court rule requiring statement of the question involved on first page of appellant's brief may result in dismissal of appeal (Rules of Supreme Court and District Courts of Appeal, rule 8, § 2).

2. New trial ⇨70

In action on balance due on note after sale of collateral security, in which action issue under defendant's counterclaim for conversion was alleged bad faith of plaintiff bank in selling stock to alleged subsidiary or agent at allegedly inadequate price, order granting plaintiff new trial on ground of insufficiency of evidence to justify verdict for defendant on the counterclaim *held* not abuse of discretion.

3. New trial ⇨71

Where evidence was conflicting on fact issue found by jury for defendant on his counterclaim, it was within trial court's discretion to grant plaintiff new trial.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by the Central National Bank of Oakland against J. Lydell Peck, in which there was a verdict for defendant on his counterclaim and cross-complaint less the amount found due on the note in suit, and judgment was entered on the verdict. From an order granting plaintiff's motion for a new trial, defendant appeals.

Affirmed.

George M. Naus and James F. Peck, both of San Francisco, for appellant.

McCarthy, Richards & Carlson, of Oakland, for respondent.

SPENCE, Justice.

This action was brought to recover the balance due upon a promissory note after the sale of certain stock held as collateral security and the application of the proceeds of said sale to the indebtedness evidenced by said promissory note. By his answer the defendant admitted the execution of the note and collateral agreement, and also admitted his default in the payment of the principal and interest on said note. Defendant alleged, however, that the sale of the stock was made in bad faith, and therefore constituted a conversion of the stock by plaintiff. Similar allegations were contained in defendant's counterclaim and cross-complaint, and he sought damages for the alleged conversion. Upon a trial by jury, a verdict was rendered in favor of defendant on his counterclaim and cross-complaint for the damages found to have been suffered by the alleged conversion less the amount found due on the promissory note. Judgment was entered upon the verdict. Plaintiff made a motion for a new trial which motion was granted "upon the grounds of the insufficiency of the evidence to justify the verdict and that said verdict is against law." Defendant appeals from the order granting a new trial.

[1] We may state that appellant has wholly failed to set forth "a statement of the question involved" on this appeal on the first page of his brief as required by rule VIII, section 2, of the Rules of the Supreme Court and District Courts of Appeal. We again call the attention of the bar to this requirement. The observance of said rule is of great assistance to the court and an appellant's failure to observe the same may result in the dismissal of the appeal. Rule VIII, § 4. We are not inclined to impose the penalty in the present case, but, unless said rule is more uniformly observed, the appellate courts may be compelled to impose the penalty to the end that this requirement designed to expedite the business of the courts, may not become a dead letter.

[2] It appears that appellant had been indebted to the respondent bank over a period of several years. The note in question was a demand note dated August 31, 1931, in the sum of \$7,383. Interest was payable monthly. Letters requesting a payment thereon had been ignored by appellant and the inter-

est payments were nine months in arrears at the time of the sale of the stock in November, 1932. The collateral agreement waived demand, but a demand was nevertheless mailed to appellant on November 1, 1932. No reply was received and the stock was sold to the Central Company on November 10, 1932. The collateral agreement provided for public or private sale, and the respondent bank was given the right to become a purchaser "directly or in the name of any other person." The stock was not a listed stock, and appellant states that it had no "market value." We assume that appellant means that there was no active market for the stock. Before the sale, officers of the respondent bank made inquiries regarding the value of the stock, but could get no information regarding any recent sales. They learned of a bid of 75 cents per share and advised their broker that, in the event he could not obtain a better bid, the Central Company would purchase the stock at that price. No better offer was obtained, and the sale to the Central Company was consummated at 75 cents per share. The proceeds were applied on the note, and this action was filed on November 19, 1932.

Respondent had sent a statement to appellant regarding the sale, and in a letter written by appellant to respondent bank on November 23, 1932, he stated, "It strikes me from your statement that my securities were needlessly sacrificed." The respondent bank replied by stating that, if he could find a buyer to purchase the stock at a price equal to or greater than that paid by the Central Company, said company was willing to deliver the stock to the bank for delivery to the purchaser. Appellant made no reply to this letter. Said offer was again made at the time of the trial, but was not accepted. On the trial both parties introduced evidence regarding the value of the stock at the time of the sale, and this evidence was highly conflicting.

[3] As above stated, appellant had not furnished us with a statement of the question involved on this appeal. A reading of his brief leads us to the conclusion that he contends that the trial court abused its discretion in granting a new trial. We find no merit in this contention. The issue raised by appellant on the trial was that of alleged bad faith on the part of respondent in selling the stock to the Central Company, an alleged subsidiary or agent of respondent, at an alleged inadequate price. The most that can possibly be said in favor of appellant was that there was a conflict in the evidence upon this issue and it was therefore within the discretion of the trial

court to grant a new trial. *Buck v. Borchers*, 203 Cal. 210, 263 P. 226; *Rosenberg v. George A. Moore & Co.*, 194 Cal. 392, 229 P. 34; *Glascock v. Watters*, 136 Cal. App. 713, 29 P.(2d) 434. We find nothing whatever to indicate an abuse of discretion in the present case.

The order granting a new trial is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



5 Cal.App.2d 380

KRAMER v. POLICY HOLDERS' LIFE INS. ASS'N.
Civ. 8972.

District Court of Appeal, Second District,
Division 1, California.

March 20, 1935.

1. Witnesses ⇨208(1)

At common law, communications between physician and patient were not privileged (Code Civ. Proc. § 1881, subd. 4).

2. Witnesses ⇨185

Statute, making communications between physician and patient privileged, should be liberally construed (Code Civ. Proc. § 1881, subd. 4).

3. Witnesses ⇨208(1)

"Act," as used in statute making privileged such information acquired by physician from patient as was necessary to enable physician to prescribe or "act" for patient, has a much broader meaning than the word "treat" (Code Civ. Proc. § 1881, subd. 4).

[Ed. Note.—For other definitions of "Act," see Words & Phrases.]

4. Witnesses ⇨209

Where licensed physician employed by donor of foundation examined woman at free clinic maintained by foundation to be able to compare findings with subsequent findings in order to test efficiency of treatment given by clinic, relation of physician and patient existed, and information gained by physician was necessary to enable him to act for patient and was therefore privileged (Code Civ. Proc. § 1881, subd. 4).

5. Witnesses ⇨219(4)

Privileged communications to physician may be waived, but intention to waive must

clearly appear (Code Civ. Proc. § 1881, subd. 4).

6. Witnesses ⇨214

Communications between physician and patient in presence of third party do not necessarily waive statutory privilege (Code Civ. Proc. § 1881, subd. 4).

7. Courts ⇨95(2)

Construction by New York courts of statute making privileged communications between physician and patient is entitled to great weight where New York statute before amendment was identical with California statute (Code Civ. Proc. § 1881, subd. 4).

8. Witnesses ⇨219(5)

Statute making privileged communications between physician and patient held not waived because physician's stenographer was present to make notes during examination and perform services of office nurse (Code Civ. Proc. § 1881, subd. 4).

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by John Kramer against the Policy Holders' Life Insurance Association. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hugh Martin Young, Charles D. Warner, and Thomas W. Hughes, all of Los Angeles, for appellant.

David Kaufman, of Los Angeles, and Leslie K. Floyd, of Modesto, for respondent.

ROTH, Justice pro tem.

Respondent, as plaintiff in the trial court, recovered judgment on an insurance policy. During the course of the trial, respondent moved to strike and the court granted the motion striking the testimony of one Dr. Roland H. Harris, called as a witness by appellant. The correctness of this ruling is attacked on this appeal, which is from the judgment.

Respondent was the beneficiary of an insurance policy in which his deceased wife was the insured. In making application for the policy on February 2, 1930, in response to appropriate questions in the application, deceased stated that she had consulted a doctor within three years for a minor operation on the breast, but had fully recovered from such operation and that her present state of health was good. Relying upon the truth of these and other representations made in the application, the policy was issued on February 5, 1930. The insured died on August 29, 1931.

On July 2, 1930, the insured visited the Coffey-Humber Clinic maintained by the W. K. Kellogg Foundation at Boyle and Michigan avenues in the city of Los Angeles. At that time and place Dr. Harris, in the presence of his stenographer, took the patient's history and made a physical examination. From the patient he learned, among other things, that between the 11th and the 24th of December, 1929, less than two months before the acceptance of her application for insurance, her right breast had been removed because of cancer. Also that, at the time of the removal of the right breast, she was informed by the doctor that there was already a tumor of the left breast, and many other facts as to her previous state of health. The physical examination revealed to the doctor that the insured had an extensive spread of cancer originating in the right breast which, in his opinion, had been in existence in her system for in excess of two years.

The testimony of Dr. Harris as to what he learned in taking the patient's history and making his examination was received subject to appropriate and seasonable objection, and subsequently on motion was stricken from the record. It is the only testimony upon which findings could be predicated that the representations made by the insured in her application for insurance were false and untrue and known to her to be so.

Obviously the answer to the question presented is to be determined by whether or not subdivision 4, section 1881, Code of Civil Procedure, applies to Dr. Harris and the insured. If the insured was the patient of Dr. Harris and he acquired the information to which he testified in attending the patient, and such information "was necessary to enable him to prescribe or act for" the patient (subdivision 4, § 1881, *supra*), then, unless there was an actual or implied waiver of the privilege, the evidence was clearly inadmissible, and the ruling of the trial court on the motion to strike was proper.

The Coffey-Humber Clinic was a free clinic. According to Dr. Harris, he was presented to the insured as Dr. Harris: "She knew me as Dr. Harris connected with Kellogg's Foundation. * * * She made an appointment to see me there (the clinic) through my stenographer, or the woman who kept the registry of all the patients; there was a book in which such appointments were made, and I saw four or five or six patients each afternoon from Monday to Friday."

Dr. Harris testified, and it appears to be the fact, that: "I was there as an observer

and took no responsibility as to the treatments of these patients. * * * I was there simply as the personal representative of Mr. W. K. Kellogg, who donated the funds. I was there to assist the W. K. Kellogg Foundation in observing 400 or more patients there, so as to be able to make a report at the end, as to the findings on the efficacy of the Coffey-Humber extract." The salary of Dr. Harris was paid by W. K. Kellogg personally. The funds necessary for the clinic to operate were supplied by the W. K. Kellogg Foundation.

Testifying specifically as to whether he examined Mrs. Kramer intending to prescribe for her, he said: "No, it was not; my intention was simply to determine her condition at that date, so as to be able at some later date to reexamine her and compare with the findings made on the first date."

It is further established that "all of the injections (which comprised the whole treatment at the clinic) were made by Doctors Coffey and Humber"; and that "no one connected with the W. K. Kellogg Foundation ever had a drop of that medicine to administer or ever did administer it." It is also established without dispute that Dr. Harris, pursuant to an appointment with the insured, took her history in the presence of his stenographer, after which he told her that he wanted to make a physical examination, and that he would have his stenographer assist in getting her ready for the examination. He said nothing to the patient about the purpose of examination or whom he was representing, and she said nothing to him on the subject.

The originals of all records made by Dr. Harris were kept by himself. A copy went to the files of the W. K. Kellogg Foundation, and another copy went into the files of the Central Coffey-Humber Clinic.

With reference to the stenographer, the uncontradicted testimony of Dr. Harris was: "I * * * called my stenographer to stay when I began my examination. The stenographer got the patient ready, took off her waist, so as to get at her chest, and the stenographer was there during the entire examination and took all that I discovered in shorthand."

The stenographer, like the doctor, was not in the employ of the clinic, but, unlike the doctor, was in the employ of the W. K. Kellogg Foundation, instead of W. K. Kellogg personally.

To epitomize: The situation on the uncontroverted facts is one in which a doctor licensed to practice medicine in this state did

by specific appointment attend a patient and during such attendance received information from such patient in the presence of a third person which, so far as he was concerned, was not necessary to enable him to prescribe for or treat or, in a strict medical sense, act for the patient. The circumstances, however, were such that the patient had a right to believe she was giving to a doctor, who was authorized to attend and talk to her, information necessary to the diagnosis of her illness and for treatment thereof.

The literal limitations of subdivision 4, § 1881, Code of Civil Procedure, as compared with subdivision 2 of the same section, create some apparent difficulties of construction. All such difficulties, as they affect this case, however, have already been resolved by reputable authority. Subdivision 2, *supra*, provides: " * * * nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity." Subdivision 4 contains no provision extending the privilege to the nurse, secretary, stenographer or clerk of a doctor.

[1] The historical background of subdivision 4 and the attitude of the courts in construing it are of interest and importance. The right provided for in subdivision 2 finds its source in the common law, whereas the privilege extended by subdivision 4 is purely a creature of statute. In *Howe v. Regensburg*, 75 Misc. 132, 132 N. Y. S. 837, 838, it is said: "At common law communications between physician and patient were not legally privileged. * * * The legal privilege seems first to have been recognized in New York in 1828. * * * To the extent, therefore, to which the privilege can now be said to exist, it must find its support in some statutory enactment. Whatever may be urged for or against the existence of the privilege, we can see no good reason for extending it by implication or construction."

[2] The courts have taken two distinct attitudes with reference to construction. These positions are clearly stated in the case of *Culver v. Union Pac. R. Co.* (1924) 112 Neb. 441, 199 N. W. 794, 796, where the court says: "Some courts have held that the statutes extending such a privilege to physicians or surgeons are remedial in their nature and should be liberally construed, while others take the view that they are in derogation of the common law, and an exception to the general rule; that the maxim, '*expressio unius est*

exclusio alterius,' should be applied and construed strictly. * * *" (Citing cases.)

Our state has proclaimed its attitude in favor of liberal construction. In the case of *McRae v. Erickson*, 1 Cal. App. 326, at pages 331-332, 82 P. 209, 211, the court says: "But to give to the statute this narrow construction would equally exclude from its application many, if not most, of the answers to questions usually put, and properly and necessarily put, by competent physicians to patients in cases of this kind, in order to enable them to act for their patients. This, we think, would be to defeat the obvious purpose of the act, which, it is said, 'is to facilitate and make safe, full, and confidential disclosure by patient to physician of all facts, circumstances, and symptoms, untrammelled by apprehension of their subsequent and enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient.' Will of Bruendl, 102 Wis. [45], 47, 78 N. W. 169. Hence it is said in the case cited: * * * 'The seal placed on the lips of the physician only relates to "information necessary to enable him to prescribe for such patient as a physician." The tendency of all courts has been and should be toward liberal construction of these words to effectuate the purpose of the statute.'"

Even in New York, which state in the case of *Howe v. Regensburg*, *supra*, apparently announces a doctrine of strict construction, the rule finally adopted is undoubtedly one of liberal construction. Thus in *Klein v. Prudential Ins. Co. of America*, 221 N. Y. 449, 117 N. E. 942, it was held that information acquired by a physician from his patient as to some ailment or disease not necessary to the treatment of or action for the patient in connection with a disease or ailment which the physician was called upon to treat was confidential. In *Springer v. Byram*, 137 Ind. 15, 22, 36 N. E. 361, 23 L. R. A. 244, 45 Am. St. Rep. 159, the rule was extended to information acquired from a third person. In the case of *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256, 260, 68 P. 771, the privilege given in the statute specifically to the patient is extended to his personal representatives and heirs at law, and in the case of *McRae v. Erickson*, *supra*, the word "necessary" in the statute receives a construction far beyond the literal meaning of the word as used in the statute. Other cases, which will be cited hereinafter, likewise demonstrate that the great weight

of authority is in favor of liberal construction.

Having oriented ourselves as to the attitude of the courts of different states, and particularly by reason of the expressed attitude of our Supreme Court on the subject, we approach a discussion of the questions here involved, assuming that the statute should receive a liberal construction.

The first question of importance which must be decided is: Did the relation of physician and patient exist between Dr. Harris and the insured on the facts as outlined.

It is said in *Jones on Evidence* (2d Ed.) vol. 5, p. 4160: "That the employment of a physician is not a matter of cold contract or protracted bargaining." The same author says further: "It is the fact of existence of a situation within the general reason and purpose of the statute which determines the existence of the privilege, rather than any contractual relation between physician and person treated." *Jones, supra*, p. 4163.

In the case of *Walmer-Roberts v. Hennessey*, 191 Iowa, 86, 181 N. W. 798, the prevailing party plaintiff in the action suffered an injury in a traffic accident. The defendant took the plaintiff to a doctor employed by the defendant. Plaintiff was examined in the presence of defendant, a traffic officer and the doctor's office girl, and the doctor thereafter "advised her as to a course of treatment." Page 801 of 181 N. W., 191 Iowa, 86. Subsequently, the doctor was called to the stand by the defendant and asked to testify. An objection to his testimony was sustained on the ground that the information the doctor had acquired was privileged. Holding that the relation of physician and patient existed and that the information was privileged, the court said, quoting from the case of *Battis v. Ry. Co.*, 124 Iowa, 623, 100 N. W. 543: "If, upon request or upon his own motion he [the doctor] assumes to advise or administer treatment to the patient, and the latter in any manner acquiesces therein, the physician thereby casts aside his relation as an employee of the company, and transfers his allegiance to the patient. In such instances a case is presented where one cannot serve two masters at one and the same time. The allegiance of the physician must be wholly upon one side or the other. It matters not, in this connection, who calls him in the first instance, or who pays him. He may present himself at the side of the patient of his own motion, and he may not expect, or in fact receive, pay."

In the case of *Smart v. Kansas City*, 208 Mo. 162, 105 S. W. 709, 717, 14 L. R. A. (N. S.) 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932, the defendant offered to prove the condition of the plaintiff in the action, at the time the injuries were sustained, by one Dr. Fulton. It appeared that Dr. Fulton saw the plaintiff lying on a cot in the city hospital, Dr. Thrush being her physician in attendance at the time; that Dr. Fulton was there holding clinics and looking for subjects to bring into the operating room; that he simply looked at the patient and looked at her right leg; that he did not treat her and that he merely said to Dr. Thrush, "Why don't you take it off?" That he was not asked to look at the plaintiff, but while she was lying on the cot he merely picked up the cover and looked at her leg. The Missouri court in holding that the relation of physician and patient existed between Dr. Fulton and the plaintiff said:

"We cannot concur with the defendant in its contention, that the relation of physician and patient never existed between plaintiff and Dr. Fulton simply because he never treated her, nor ever intended to do so.

"This record shows Dr. Fulton was rightfully in the hospital, was exercising authority over the patients, examining their persons, advising treatment, and removing patients from their wards to the operating room for clinical purposes; and all this with the knowledge and consent of those in charge of the institution. If he was not rightfully there, then he was not only a trespasser in the institution, but was guilty of the crime of assault and battery by approaching plaintiff's bed, where she was lying, and pulling up the covers and exposing her person and making the examination. * * * It is not necessary in order to create the relation of physician and patient that he should actually treat the patient. If he makes an examination of the patient, with her knowledge and consent, she believing that the examination is being made for the purpose of treating her, then the relation is created by implication, and it is wholly immaterial what the secret object or purpose of the physician was in making it; and, in the absence of evidence to the contrary, the plaintiff had the perfect right to assume and rely upon the assumption that the physicians who were apparently in charge of the hospital were rightfully there, and, as such, had the authority to examine and prescribe for her, and he will not afterwards be heard to say he was not connected with the institution and had no authority to examine or treat her. If such a thing as that could be

done, then the privilege accorded the patient could be taken from her by trick or fraud."

To the same effect on similar facts, see *Beave v. St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52; *Mutual Life Insurance Co. of N. Y. v. Owen*, 111 Ark. 554, 164 S. W. 720; *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770.

Our courts have also spoken on what is necessary to create the relationship of physician and patient. Thus, in the case of *Webb v. Francis J. Lewald Coal Co.*, 214 Cal. 182, 186, 4 P.(2d) 532, 533, 77 A. L. R. 675, the court says:

"First, it is our conclusion that the testimony was privileged under the broad language of subdivision 4 of section 1881 of the Code of Civil Procedure, which reads in part: 'A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. * * *' The word 'act,' used in this connection, seems to cover the very service performed by the witness here. He acted for respondent by making the examination and by making and delivering to her counsel a written report of his findings. He was her physician and she his patient only for this limited purpose. * * *

"But counsel insists that a controlling exception to the above rule is found in the further provision of said subdivision 4 of said section, which reads as follows: 'Provided, further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify. * * *' We do not believe that the words 'prescribed for or treated' of this proviso cover the identical scope of the words 'to prescribe or act' found in that portion of subdivision 4 above quoted. * * * A physician may properly act for a patient without having thereby prescribed for or treated him and the case before us seems fairly to be an illustration of this fact."

In the *Webb Case* the court was passing on a situation in which a doctor had been called in to make an examination for the sole purpose of rendering a written report of the physical condition of plaintiff to her attorney. The doctor in question did not attend and had not at any time prior thereto or thereafter attended the patient with the view of pre-

scribing for or treating her in any manner whatsoever.

[3] There can be little doubt that the word "act" has a much broader scope and meaning than the word "treat." Our courts, however, have gone even further in defining the scope of the word "act." Thus, in the case of *McRae v. Erickson*, 1 Cal. App. 326, pages 332, 333, 82 P. 209, 212, the court says: "We are therefore of the opinion that the view of the court below in this case was correct, and that the intention of the statute is to exclude all statements made by a patient to his physician while attending him in that capacity for the purpose of *determining* his condition. (Italics ours.) Nor does this construction do violence to the language of the act liberally construed, which we think is to be understood as forbidding a physician to be examined 'as to any information acquired in attending the patient, *the acquisition of* which was necessary (or which it was necessary for him to acquire) *in order* to enable him to prescribe or act for the patient.' Of this necessity, from the nature of the case, the physician must commonly be regarded as the sole judge; for it would be obviously unreasonable to require of the patient the exercise of any judgment with reference to the propriety of the questions asked by his physician, except, possibly, in cases where the materiality of the question is obviously apparent."

Although the record is silent, so far as direct evidence is concerned, with reference to some important details, there are certain inevitable inferences which must be drawn from the evidence which establish without question that the relationship of physician and patient existed as a fact and without the aid of judicial construction.

[4] It is clear from the evidence that the Coffey-Humber Clinic was a cancer clinic. This clinic was established to treat patients suffering from cancer, and it is fair to assume that an applying patient was not injected with the Coffey-Humber extract merely on the statement of the applicant that he had cancer. Some one had to talk to and examine the patients who applied for treatment. That Dr. Harris and other doctors performed these duties is uncontradicted; that Dr. Harris had regular hours at the clinic is uncontradicted; that Dr. Harris had appointments made for him through the girl who kept the registry book and that he met the insured in that way is also uncontradicted. It is further established, without contradiction, that the originals of written reports made by Dr. Harris, showing the results of his examina-

tion, were kept by himself, and that copies were transmitted, one to the clinic and one to the W. K. Kellogg Foundation. We can hardly be expected to assume that Drs. Coffey and Humber, who actually administered the treatment by injecting the extract, did not know that Dr. Harris was there, or that they did not know what Dr. Harris was doing. The only reasonable and logical assumption that can be drawn is that Drs. Coffey and Humber knew that Dr. Harris was there, knew exactly what he was doing, and that he was performing such functions with their consent. Further, it is fair to assume that a patient could not receive the treatment unless examined by Dr. Harris or some other doctor who performed the same duties as a condition precedent. If these inferences are sound, and we believe as we have stated that they are inevitable, then the examination made by Dr. Harris—both oral and physical—was indispensable to the treatment received and a part thereof. The judicial construction of the statute, the direct facts proved and the legal inferences which such facts create, convince us that the relationship of physician and patient existed between Dr. Harris and the insured.

Appellant urges further that not only must the relationship be established, but it must appear that the information claimed to be confidential must have been acquired while attending the patient, and must be such as is necessary to enable him to prescribe or act for the patient. As a Hornbook generality this is so, but this language of the statute has also been construed so as to unfetter the statute from its strict letter and give effect to its intention. Thus, in the case of *McRae v. Erickson*, supra, it has been held that even though the information received is not strictly necessary to prescribe and act for the patient, it is held privileged. Many other cases herein cited are to the same effect. We are satisfied on the facts and in view of the law as enunciated in the case of *McRae v. Erickson*, supra, that all of the information received, and to which the motion to strike was directed, is within the scope of the statutory privilege.

The sole remaining question of import is whether the presence of the stenographer at the time that the disclosures testified to by the doctor were made by the insured operates as a waiver of the privilege.

[5] The statute does not provide for a waiver of the privilege, but it has been settled that the privilege may be waived. *Hirschberg v.*

Southern Pac. Co., 180 Cal. 774, 777, 183 P. 141; *Jones*, (2d Ed.) vol. 5, p. 4183. It must clearly appear, however, that there is an intention to waive and a court will not run to such a conclusion. Thus, prior to the amendment adding the second and fourth provisos of subdivision 4, § 1881, Code of Civil Procedure, it was held that the representatives of a deceased could not waive the privilege. *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, pages 166, 167, 47 P. 1019. In the *Hirschberg Case*, pages 776-779 of 180 Cal., 183 P. 141, 142, which was a suit for personal injuries, plaintiff called the doctor "who treated her for the first time after the injury * * * described in minute detail the condition of the organs of the pelvic region, including a displacement of the uterus." On cross-examination she was asked if "she was not treated (years before) by a Dr. Marvel for a displacement of her uterus. Her answer was flatly in the negative * * *." Defendant attempted to introduce the deposition of Dr. Marvel and an objection to its introduction was sustained. In treating the matter, the court said:

"The appellant contends that the deposition of Dr. Marvel was admissible upon two grounds: 'First. Mrs. Hirschberg, by her own testimony and by disclosures made with her consent by her physician, waived any right which she may have had to the exclusion of the testimony of the physician. Second. She testified that Dr. Emery Marvel was not her physician, and that he had never treated her for any disease except that of lumbago. If he was not her physician, then certainly she could not object to his testifying in the case. In other words, if she claimed the privilege of excluding the communications between Dr. Marvel and herself from the consideration of the jury she could only do so upon the theory that he was her physician. She could not deny that the relationship existed, and in the same breath claim his testimony could not be offered because it was a privileged communication.' * * * The testimony of Dr. Marvel purported to cover information acquired by him while attending the plaintiff as her physician several years before. * * * This question, so far as we are able to find, has never been passed upon in this state. However, the case of *Missouri & N. A. R. Co. v. Daniels*, 98 Ark. 352, 136 S. W. 651, decided in 1911 by the Supreme Court of Arkansas, is so clearly analogous in its facts and presents so concisely the exact point of law here involved that we will quote from it at some length. * * *

"Counsel for the defendant upon cross-examination of plaintiff asked her if the physicians whom defendant desired to introduce as witnesses as to her condition prior to the alleged injury had not treated her in 1907 for displacement of the womb. This she denied, and it is now urged by the defendant that it was entitled to have the benefit of these physicians' testimony in order to contradict the plaintiff. But, if the defendant's position in this respect should be upheld, then the above statute in regard to privileged communications would be easily evaded. In any cause where the opposing party desired to obtain the testimony of an attending physician, it could be secured in like manner, although against the objection of the patient. The plain provisions of the statute forbidding such testimony by a physician cannot thus be abrogated. * * *

The foregoing authorities make clear that a waiver will not be implied by the courts unless the facts decisively show or a clear preponderance of the inferences from the facts impel a finding that the privilege has been waived. We will now proceed to the problem here presented.

[6] As already suggested, the mere presence of a third person does not mean that the privilege has been waived as to the doctor. The capacity in which the third person is present makes a real difference. There are three lines of cases in this respect. One in which a third party is present, whose presence is in no respect necessary, and this is obviously apparent to the patient. In this type of case some decisions hold that both the physician and the third party may testify (*Horowitz v. Sacks*, 89 Cal. App. 336, 265 P. 281), and some that the third party only may testify. *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 463, 88 N. E. 356; *Walmer-Roberts v. Hennessey*, 191 Iowa, 86, 181 N. W. 798. The second line of authorities applies to that type of case in which a third party is present and the patient has a right to believe that said party is present as one of the agents or assistants of the physician in charge. In this class the authorities agree that the attending physician cannot testify, but as to the third persons they divide themselves into three groups. The first group for convenience may be referred to as the coprofessional class, in which it is held that when said third party being a licensed doctor is a consulting doctor (*Renihan v. Dennin*, *supra*; *Leonczak v. Minneapolis*, etc., Ry. Co., 161 Minn. 304, 201 N. W. 551); or an assistant

doctor (*Renihan v. Dennin*, *supra*; *Prader v. National Masonic Acc. Assn.*, 95 Iowa, 149, 63 N. W. 601; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185, 194); or the partner of a doctor (*Raymond v. Burlington C. R. & N. Ry. Co.*, 65 Iowa, 152, 21 N. W. 495; *Aetna Life Ins. Co. v. Denning*, 123 Ind. 384, 25 N. E. 86, 375), neither the attending doctor nor his coprofessional may testify.

The second group for convenience may be called professional agents, in which it is held that when a nurse or other third person is actually working as agent and assistant under the supervision of the doctor in charge, such agent is covered by the privilege as well as the doctor. A study of the cases in this group, however, shows that the statute had been extended to include nurses. *Culver v. Union Pac. R. Co.*, 112 Neb. 441, 199 N. W. 794. Such not being the fact here, we will not discuss this group, although the *Culver Case*, *supra*, speaking without regard to the amendment of the statute to include nurses, does suggest that the statute should as a matter of law be extended to the professional assistant. We express no opinion on the suggestion, since none is necessary to a decision of this case.

The third group holds that in situations where the presence of a third person is apparently necessary, the doctor is covered by the privilege, but the necessary third person is not. *Hobbs v. Hullman*, 183 App. Div. 743, 171 N. Y. S. 390; *Id.*, 188 App. Div. 983, 177 N. Y. S. 917; *Southwest Metals Co. v. Gomez* (C. C. A. Ariz.) 4 F.(2d) 215, 39 A. L. R. 1416; *Springer v. Byram*, 137 Ind. 15, 36 N. E. 361, 23 L. R. A. 244, 45 Am. St. Rep. 159; *North American Union v. Oleske*, 64 Ind. App. 435, 116 N. E. 68, 70; *Denaro v. Prudential Ins. Co.*, 154 App. Div. 840, 139 N. Y. S. 758; *People v. Brower*, 53 Hun, 217, 6 N. Y. S. 730; *Cahen v. Continental*, etc., Co., 41 N. Y. Super. Ct. 296; *Walmer-Roberts v. Hennessey*, 191 Iowa, 86, 181 N. W. 798.

The third general line of authority applies to those cases in which a nurse or other third party, as separate individuals in independent positions and not as incidents to a conference with the doctor in charge, receive medical confidence. All of these cases are to the effect that such confidence is not within the privilege. *Miss. P. & L. v. Jordan*, 164 Miss. 174, 143 So. 483; *Culver v. Union Pac. R. Co.*, 112 Neb. 441, 199 N. W. 794; *Wills v. National Life & Accident Ins. Co.*, 28 Ohio App. 497, 162 N. E. 822.

An analysis of the facts in the foregoing cases and the rules therein enunciated dem-

onstrates the extreme jealousy on the part of practically every court, which has been asked to construe a statute similar to our own, to guard the privilege and to save it from being frittered and nibbled away because of factual situations which do not come within the letter of the statute, but are plainly embraced within its intent and spirit.

[7] Aside from the fact that the great weight of authority demonstrates that in a situation, such as here presented, a doctor cannot testify, which fact of itself points the road for this court to follow in the absence of authority of our own, New York authority on this subject is particularly persuasive upon this court. The statute construed in the cited New York cases, before the amendment to include nurses, was identical to our own. Our Supreme Court has said: " * * * since our statute seems to be framed largely after that of New York, the construction given the latter by the courts of that state should have great weight with us in interpreting the meaning of our own." *Harrison v. Sutter St. Ry. Co.*, supra, page 168 of 116 Cal., 47 P. 1019, 1022.

The only California case to which our attention has been called which is at all related on the facts is the case of *Horowitz v. Sacks*, 89 Cal. App. 336, 265 P. 281. In that case, the court says at page 344 of 89 Cal. App., 265 P. 281, 285: " * * * All of the information the witness obtained from his patient was obtained in the presence and hearing of three third parties, the husband, mother, and brother of the patient. Such communications of the patient were not confidential and therefore were not privileged." It will be discerned, however, that the *Sacks* Case is easily distinguished in at least one vital element, even if there were no other elements in that case which do distinguish it. In the instant case the communications were made in the presence of a necessary third party who was acting as the agent of the doctor, under his direction and supervision and under such circumstances that the patient had every right to conclude that the presence of such third party was necessary. In the *Sacks* Case the information was given in the presence of nonprofessional and unnecessary third persons, in so far as the attendance of the

doctor was concerned. It is apparent that although called a stenographer, the third party in the instant case was in reality and did perform all the duties of an office nurse. This distinction calls for the application of a principle different from that applicable when a third party has, strictly speaking, no business being present. See cases supra. The statement in the *Sacks* Case must, however, be construed in relation to the facts to which it was applied. As a general statement purporting to be the law in all cases, it cannot be accepted, and the cases cited to support the general statement made in the *Sacks* Case do not so hold. It is quite clear that the court in the *Sacks* Case did not so intend it, when the statement is read in the light of the authorities cited to support it, and the facts to which it was applied. The cases referred to in the *Sacks* Case and others called to our attention by appellant with practical unanimity are decided on the doctrine that the communications made and testified to were not in fact confidential, and were not intended to be so by the person making them, and this conclusion is reached by the court in those cases not merely because the nonprofessional unnecessary third party was present, but on additional facts such as the voluntary nature of the statements, their irrelevancy to the confidential relationship, the fact as to whether the relationship existed at all, and other important circumstances.

[8] In *Southwest Metals Co. v. Gomez*, supra, the Federal Circuit Court of Appeals of this district had before it a parallel situation—the construction of an Arizona statute similar to our own. It was there held that the nurse could testify, but that the doctor could not. We are satisfied that the presence of the stenographer did not operate to waive the privilege, in so far as the doctor was concerned, and that the motion to strike was correctly granted. Since the stenographer was not called and did not testify, we are not called upon to determine whether she could testify.

There being no other errors called to our attention and none other appearing, the judgment is hereby affirmed.

We concur: CONREY, P. J.; YORK, J.

5 Cal.App.2d 159

PEOPLE v. CANTOR.
Cr. 2662.

District Court of Appeal, Second District,
Division 2, California.
March 6, 1935.

1. Criminal law Ⓒ331

Defendant has burden to establish defense of insanity by preponderance of evidence.

2. Criminal law Ⓒ48

Defendant who knows nature and quality of act at time of its commission and wrongfulness of act is legally accountable therefor, although he may be mentally abnormal or defective or may suffer from nervous disorder.

3. Criminal law Ⓒ570(1)

Evidence sustained conviction of robbery as against defense of insanity.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Noah Cantor was convicted of robbery in the first degree, and he appeals.

Judgment and order affirmed.

I. R. Shultz and Friedman & Katzev, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

In April of 1931 an information was filed charging defendant with having committed the crime of robbery during the previous month. He entered a plea of "not guilty" and "not guilty by reason of insanity." In May, 1931, on the date of trial, a jury was impaneled to try the issue of the present sanity of defendant, and a verdict was returned finding him insane. He was thereupon committed to the Mendocino State Hospital. After approximately three and one-half years' confinement in that institution, he was returned to court with a certificate that he "is now sane." The case was reset for trial on the issues tendered by his above plea, and in November of 1934 defendant appeared in court with counsel, waived a jury, and proceeded with the trial. The court found him guilty of robbery in the first degree, and found that a deadly weapon had been used in the perpetration of the crime. The issue as to defendant's sanity at the time of its commis-

sion was then tried, and the court found "that the defendant knew he was doing wrong and that therefore he was sane at the time of the commission of the robbery." Motion for new trial was made and denied. Probation was summarily denied, and defendant was sentenced. He appeals from the judgment and order denying motion for new trial.

The sole contention of appellant is that the court erred in concluding that he was not insane at the time the crime was committed.

[1, 2] "The burden of proof is always upon the defendant, or upon the person who asserts the insanity of another, to establish its existence by a preponderance of evidence." *People v. Gilberg*, 197 Cal. 306, 240 P. 1000, 1004. "In order to overcome the presumption of sanity and sustain the burden of proof on that issue, it must be made to appear 'that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed.' *People v. Willard*, 150 Cal. 543, 89 P. 124, 129. See, also, *People v. Sloper*, 198 Cal. 238, 244 P. 362. Responsibility depends upon whether the defendant knew the nature and quality of the act at the time of its commission, and the wrongfulness of the act. If he had sufficient mental capacity to know what he was doing, and to know that it was wrong, he is legally accountable for his act. Even though he may be mentally abnormal or defective, or may suffer from some nervous disorder, he is, under our law, held to full responsibility for his act, unless the evidence brings him within the strict legal meaning of insanity. See *People v. Gilberg*, 197 Cal. 306, 240 P. 1000." *People v. Keaton*, 211 Cal. 722, 296 P. 609; 8 Cal. Jur., p. 188.

[3] About 9 o'clock p. m. on the day of the robbery defendant waited around a service station until some customers had been served and then entered with a one-gallon can, asking to purchase gasoline. He inquired of the attendant, "do you think this can is red enough to get by?" referring to the can he carried. When the attendant rang up the sale on the cash register defendant pointed a gun at him, said, "Stand where you are," and then took the contents of the register. Defendant then had the attendant step outside, and, as another attendant approached, covered them both with his gun and said, "Now let's stand here like nothing is happening." In a moment a roadster drove up, defendant backed away, turned and jumped into the car. Half an hour later defendant and his com-

panion were located and arrested. The loaded gun was found in the bottom drawer of defendant's trunk. An officer testified that after the arrest "defendant turned to Mr. Trapnell [his codefendant] and told him to shut his mouth; that one man taking the beef was enough," that defendant appeared cool and calm, and that at the police station he asked: "How many years does a guy get for robbery with a rod? About seven years, isn't it?"

From the foregoing and other evidence disclosed by the transcript it appears that the trial court may reasonably have concluded that defendant was not legally insane at the time of the holdup, and that he must be held responsible for his lawless act. *People v. McConnell*, 80 Cal. App. 789, 252 P. 1068.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 199

VARNER v. HATTENHABER et al.
Civ. 9375.

District Court of Appeal, Second District,
Division 2, California.
March 9, 1935.

1. Appeal and error $\hookrightarrow$ 931(1), 1010(1)

On appeal, reviewing court has duty to view evidence in light most favorable to party prevailing in trial court, and, if there is any substantial evidence to support findings, contention must be resolved in favor of their support.

2. Automobiles $\hookrightarrow$ 245(90)

In automobile collision case, whether plaintiff's position on running board of automobile was a proximate cause of his injuries *held* for jury.

3. Evidence $\hookrightarrow$ 317(9)

In automobile collision case, proof of statements allegedly made by driver of automobile, on running board of which plaintiff was riding, admitting acts of negligence on his part, *held* properly excluded as hearsay, in absence of any claim at time that plaintiff and driver were engaged in joint enterprise.

4. Trial $\hookrightarrow$ 251(8)

In automobile collision case, where defense that plaintiff was engaged in joint en-

terprise with driver of automobile, on running board of which he was riding, had not been made an issue, instruction on joint enterprise *held* properly omitted.

5. Appeal and error $\hookrightarrow$ 1059

Where plaintiff was injured while riding on running board of automobile, refusal to admit ordinance prohibiting riding on running board of automobile *held* not error, where court had included ordinance in its instructions.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Gilbert Varner against George Hattenhaber, Joe Davis, and others. From a judgment for plaintiff, Joe Davis appeals.

Affirmed.

Sherman Anderson, of Los Angeles, for appellant.

Murchison & Murphy, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment for damages arising out of an automobile collision. At the time of the collision the plaintiff was riding on the running board of a Chrysler car, devoting his time and attention in an attempt to stay the loss of blood of a friend who had been stabbed with a knife. They were on their way to a receiving hospital. The defendant was driving a Chevrolet car, and, as the Chrysler car was turning to the left at an intersection, the defendant's car ran into the Chrysler, smashing it up badly and forcing it sideways, so that the skid marks on the street showed for several feet. The impact of the defendant's car left the Chrysler car a wreck, crushing the plaintiff's foot and causing him other injuries. The judgment went for plaintiff, and defendant appeals. For the sake of clarity we shall refer to the parties as plaintiff and defendant rather than appellant and respondent.

[1] It is the defendant's first contention that the evidence fails to show any negligence on his part which proximately caused plaintiff's injuries. On appeal it is the duty of this court to view the evidence in the light most favorable to the party prevailing in the trial court, and, if there is any substantial evidence to support the findings, we must resolve this contention in favor of their support. We have reviewed the evidence, and we find it supports the findings and the judgment.

[2] The defendant next contends that, since the plaintiff was violating a city ordinance in riding upon a running board, he was guilty of negligence per se, and that the conclusion is inescapable that as a matter of law the plaintiff's position on the running board proximately contributed to his injuries. He relies upon the case of *Lorry v. Englander Drayage & Warehouse Co.*, 108 Cal. App. 116, 291 P. 467, 468. That was a case in which the facts were somewhat similar to the facts herein, although in that case the jitney bus was so little damaged that immediately after the collision one of the defendants took the injured person into it and drove it under its own power to the hospital. In sustaining a judgment of the superior court in favor of the defendants, the appellate court said: "Under these facts we can see no escape from the conclusion that the conduct of appellants in riding on the running board in violation of the ordinance was a proximate contributing cause of their injuries." But the court further said: "We can conceive of cases where the impact might be of such a character that a jury would be justified in holding that the negligence of a person riding on the running board in violation of an ordinance did not proximately contribute to his injuries." The mere fact that a person occupies the unusual position of standing on the running board while riding in or on a motorcar does not in and of itself constitute a proximate cause of his injuries. And it is never open season for one motorcar to mow down a person who occupies a hazardous or legally forbidden place on a moving automobile. In the instant case the trial judge thought the facts were such as to warrant submitting the question to the jury. We are satisfied that under the facts in the instant case reasonable men might reach different conclusions with regard to the matter.

[3] Defendant next contends that the court erred in excluding proof that the driver of the car on which plaintiff was riding admitted certain acts of negligence on his part. Obviously this would be hearsay evidence as to the plaintiff, but the defendant now contends that the plaintiff and the driver were engaged in a joint enterprise. An inspection of the reporter's transcript shows that no such claim was made to the trial court at the time the evidence was offered and rejected.

[4] It is next contended that the court erred in refusing to give an instruction on the doctrine of joint enterprise. That defense was not an issue which the jury were called

upon to determine, and the court properly omitted such an instruction.

[5] It is next contended by the defendant that the trial court erred in refusing to admit in evidence the city ordinance with regard to riding on the running board. But the court did include the ordinance in its instructions and did direct the jury that a violation thereof was negligence per se.

The defendant also contends that the court erred in denying defendant's motion for a nonsuit and in later denying defendant's motion for an instructed verdict, but, for the reasons heretofore indicated, we find against the defendant on these matters.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT.
Justice pro tem.



5 Cal.App.2d 319

SHIFLET v. BURKS.

Civ. 1400.

District Court of Appeal, Fourth District,
California.

March 18, 1935.

Appeal and error ⇐430(1), 554(2), 607(1),
783(2)

Appeal must be dismissed, where county clerk's certificate, disclosing notice of appeal nearly two months after entry of judgment, no motion for new trial, and no steps to secure transcript, bill of exceptions or other record, and notice of motion to dismiss appeal are only records filed in appellate court.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by T. R. Shiflet against F. L. R. Burks. Judgment for defendant, and plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

John D. Chinello and Leonard B. Fowler, both of Fresno, for appellant.

Sutherland, Dearing & Jertberg and Conley, Conley & Conley, all of Fresno, for respondent.

MARKS, Justice.

This is a motion to dismiss the appeal. The certificate of the county clerk of Fresno county discloses that judgment was entered on December 17, 1934; that notice of entry of judgment was served on the next day; that no motion for new trial was made; that notice of appeal was given on February 16, 1935; that no steps have been taken to secure a clerk's or reporter's transcript, bill of exceptions, or other record on appeal. The only records filed in this court are the certificate of the county clerk and notice of motion to dismiss the appeal with supporting points and authorities. Under these circumstances, the motion must be granted.

Appeal dismissed.

We concur: **BARNARD, P. J.; JENNINGS, J.**



5 Cal.App.2d 287

HALAMINSKY v. NELSON et al.

Civ. 9413, 9414.

District Court of Appeal, Second District,
Division 2, California.

March 16, 1935.

Rehearing Denied April 15, 1935.

1. Appeal and error ☞882(12)

Plaintiff could not complain of instruction embodying ordinance, where ordinance was admitted by parties' stipulation and case was tried on theory by both sides that it was proper for jury to consider it.

2. Trial ☞296(3)

Instruction that motorists were not required to anticipate that pedestrian would be in improper and unlawful position in street held not reversible error, in view of other instructions that motorist has no right to assume that road is clear, but must always be reasonably diligent, and must anticipate presence of others lawfully on street.

3. Automobiles ☞246(31)

Trial ☞194(16)

Instruction that motorists were not required to anticipate that pedestrian would be in improper and unlawful position in street held not erroneous as charging jury that violation of ordinance barred recovery without regard to whether violation contributed to injury sustained, or as precluding jury from finding defendants negligent.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Actions by Mary Halaminsky against Charles Nelson, Jr., and another. From judgments for defendants, plaintiff appeals.

Affirmed.

Rex B. Goodcell and Manley C. Davidson, both of Los Angeles, for appellant.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for respondents.

CRAIL, Justice.

These are two appeals by the plaintiff from two judgments in favor of the defendants (respondents) in actions for damages for personal injuries arising out of an automobile collision. The two cases are presented together on appeal. The plaintiff and her deceased husband were pedestrians crossing an intersection of streets in Los Angeles when hit by defendants' automobile.

We have had little help from the defendants in this case for the reason that instead of answering the points raised by the plaintiff, defendants devote many pages to arguing in favor of the negative of the following question which they themselves propound: "Did the court err because of instructing on the defendants' theory of the case, or should it have instructed only on the plaintiff's theory?" Obviously the defendants reach a conclusion which is satisfactory to themselves.

[1] The first and principal contention of the plaintiff is that the court erred in giving certain instructions to the jury. The first instruction of which complaint is made is defendants' instruction No. 24. Plaintiff contends that the city ordinance as embodied in this instruction conflicts with the provisions of section 131½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1931, p. 2127) in so far as the facts in this case are concerned. "It is not contended," she says, "that under every conceivable set of circumstances it would be erroneous to give Defendants' Instruction No. 24, or that the City Ordinance would not apply. * * *" Her contention is that under the peculiar facts in this case the ordinance is conflicting. However, the ordinance was admitted into evidence by stipulation of the parties, and the case was tried in the superior court upon the theory by both sides that it was proper for the jury to consider it in their determination of the issues. Under such circumstances, plaintiff's contention is without merit.

[2, 3] Plaintiff next contends that the court erred in giving instruction No. 19 in which the court said, in effect, that if the jury find that plaintiff was unlawfully or improperly in the street at the time of the accident, then the defendants were not required to anticipate that plaintiff would be in an improper and unlawful position. We do not like the instruction. It was a clumsy attempt to set forth the rule laid down in *Rosella v. Paxinos*, 110 Cal. App. 299, 294 P. 39, and *Harris v. Johnson*, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560, namely, that a person is not required to anticipate a danger which is created solely by the violation of law or duty by another. It is possible, but not probable, that the jury might be misled by this instruction into believing that if the plaintiff was in the street unlawfully then the defendants were no longer bound by the duty to operate the auto in a careful and prudent manner. However, the court fully instructed the jury in other instructions that the driver of an automobile has no right to assume that the road is clear, but under all circumstances and at all times must be reasonably diligent and must anticipate the presence of others lawfully upon the street, and has no right to assume that the road is clear, and is bound to anticipate that he may meet persons at any point in the street. The jury was so clearly instructed in this regard that we do not believe it was misled. Plaintiff's further contention that the said instruction charged the jury that a violation of the city ordinance barred the plaintiff's right to recover without regard to whether or not said violation contributed to the injury sustained is not borne out by an inspection of the instruction itself, and the same may be said with reference to plaintiff's further contention that the instruction precluded the jury from finding the defendants negligent.

Plaintiff makes further contentions with regard to this and other instructions which were given and with regard to the failure to give an instruction requested by the plaintiff, but we see nothing which would entitle the plaintiff to a reversal. The trial court in the hurly-burly of a trial cannot get every t crossed and every i dotted, and the instructions were as nearly perfect as could be expected. Cases are seldom reversed for errors in instructions, since the people put into the Constitution the mandate that no judgment shall be set aside on the ground of misdirection of the jury unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error

complained of has resulted in a miscarriage of justice. In this case there was no miscarriage of justice. Neither was there error in denying plaintiff's motion for a new trial.

Judgments affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



5 Cal.App.2d 246

SUTLIFF v. DEMPSEY et al.
Civ. 5320.

District Court of Appeal, Third District,
California.
March 14, 1935.

Rehearing Denied April 13, 1935.
Hearing Denied by Supreme Court
May 13, 1935.

1. Appeal and error ⇨554(2), 607(1), 641

Appeal held dismissible where no notice was served upon clerk requesting him to prepare transcript of proceedings, no bill of exceptions was prepared or settled, and there was no certificate of trial judge in record, which contained only clerk's certificate to effect that pleadings, proceedings, and minute orders which were printed in transcript were correct copies of original, but which did not certify that they were only proceedings and orders which appeared in records of court (Code Civ. Proc. §§ 650, 940, 953a; Rules of Supreme Court and of District Courts of Appeal, rule 29).

2. Appeal and error ⇨612(2)

Trial judge is only one authorized to authenticate pleadings, proceedings and documents used upon a hearing before him, either by settling bill of exceptions or in manner provided by statute (Code Civ. Proc. §§ 650, 940, 953a; Rules of Supreme Court and of District Courts of Appeal, rule 29).

Appeal from Superior Court, Yuba County;
J. O. Moncur, Judge.

Action by Bruce H. Sutliff against W. J. Dempsey, F. D. Gordon, and the Fidelity & Deposit Company of Maryland. From an order in favor of last-named defendant, other defendants appeal, and last-named defendant moves to dismiss the appeal.

Appeal dismissed.

W. E. Davies, of Marysville, for appellants.

Homer Lingenfelter, of Marysville, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The respondent has moved to dismiss the appeal of the defendants Dempsey and Gordon from an order of the superior court of Yuba county which was entered subsequent to the rendering of final judgment. The motion to dismiss the appeal is based upon rule XXIX of the Rules of the Supreme Court and of the District Courts of Appeal, for failure to properly authenticate the pleadings and proceedings involved.

[1] Judgment was rendered against the defendant Fidelity & Deposit Company of Maryland as surety on a guardian's bond in the estate of a minor, for the full amount of its liability in the sum of \$2,250. The same judgment held the codefendants Dempsey and Gordon liable on another bond in the same estate for the additional sum of \$1,014.82. The defendant surety company promptly paid the judgment and filed its notice and demand for contribution from the other defendants as provided by section 709 of the Code of Civil Procedure. Upon proceedings duly had the court ordered that an execution issue against the defendants Dempsey and Gordon to satisfy their proportion of the judgment. Thirty-six days after this order for execution was made, notice of appeal therefrom was served and filed pursuant to section 940 of the Code of Civil Procedure.

The appeal was not taken under the provisions of section 953a of the Code of Civil Procedure. No notice was served upon the clerk as required by that section of the Code requesting him to prepare the transcript of proceedings. Neither was a bill of exceptions prepared or settled pursuant to section 650 of the Code of Civil Procedure. All that does appear on appeal to this court is a purported transcript which does contain the pleadings and proceedings together with the notice of appeal. There is no certificate of the trial judge settling a bill of exceptions or even vouching for the validity or accuracy of the documents which are contained in the transcript. The record contains no certificate of the judge. All that the record on appeal does contain regarding the authenticity of the pleadings and proceedings is the clerk's certificate to the effect that the pleadings, proceedings, and minute orders which are contained in the printed transcript are full, true, and correct copies of the originals which ap-

pear in the record of the case. The certificate does not certify that they are the only proceedings and orders which appear in the records of that court.

[2] The appellants have failed to comply with the provisions of rule XXIX of the Rules of the Supreme Court and of the District Courts of Appeal, or with the provisions of section 953a of the Code of Civil Procedure. It has been frequently held that the judge of the trial court is the only one authorized to authenticate the pleadings, proceedings and documents used upon a hearing before him, either by settling a bill of exceptions or in the manner provided by section 953a of the Code of Civil Procedure. *Patterson v. Rutherford*, 39 Cal. App. 647, 179 P. 704; *Muzzy v. D. H. McEwen Lumber Co.*, 154 Cal. 685, 98 P. 1062. The record in this case lacks due authentication.

The appeal is dismissed.

We concur: PULLEN, P. J.; PLUMMER, J.



5 Cal.App.2d 168

WAGAMAN v. CLIFFORD F. REID, Inc.,

et al.

Civ. 5272.

District Court of Appeal, Third District,
California.

March 7, 1935.

1. Vendor and purchaser ⇨33

Person induced to enter into contract to purchase realty through fraudulent representations is entitled to rescind contract and recover consideration paid, even though contract recites that person has purchased as result of his own inspection and not upon representations of vendor or his agent, and that vendor is not responsible for representations not set forth in contract.

2. Vendor and purchaser ⇨119

Right of purchaser to rescind contract for purchase of land for failure of vendors to resell property for purchaser in four weeks according to their representations held not barred by laches, where contract was entered into in June, 1930, and purchaser, although she had delayed action because of agent's assurances that he had client, had finally placed matter with attorney early in 1931,

who carried on negotiations until filing of complaint in October, 1931.

3. Contracts ⚡270(2)

Where party to contract promptly protests on discovering fraud and negotiates for settlement, complaint for rescission filed within reasonable time after failure of settlement is not barred by laches.

4. Appeal and error ⚡1008(1)

Whether party defrauded has promptly rescinded contract is question primarily for trial court to determine.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Suit by Maude Wagaman against Clifford F. Reid, Incorporated, and another. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Kenneth W. Kearney, of Los Angeles, for appellant.

W. C. Shelton, Geo. W. Burch, Jr., Gibson, Dunn & Crutcher, and Max Eddy Utt, all of Los Angeles, for respondents.

Mr. Chief Justice PULLEN delivered the opinion of the court.

This is an appeal by plaintiff from a judgment of nonsuit entered against her in an action for the rescission of a contract to purchase certain real property.

The complaint alleges that on June 3, 1930, plaintiff, who was a widow and unfamiliar with business, and defendants entered into a written contract whereby defendants agreed to sell to plaintiff certain described real property for \$16,900, upon account whereof plaintiff paid \$3,947.65. The complaint then sets out several representations which it is claimed defendants made to plaintiff, and concludes with the customary allegations that these representations were knowingly false and were made for the purpose of inducing plaintiff to enter into the contract, which representations plaintiff believed and relied upon. It is further alleged that plaintiff did not discover the alleged fraud until August, 1931, at which time she notified defendants that she elected to rescind, and offered to return to them anything of value she had received.

Defendant Clifford Reid, Incorporated, admitted the making of the contract, the payment of the sum of \$3,947.65, the service of the notice of the rescission, and denied the other allegations of the complaint. Defendant

Security First National Bank of Los Angeles similarly denied the allegations in the complaint, alleged laches, and also set out as an affirmative defense the following paragraph in the contract: "It is understood and agreed that the Buyer is of legal age and that the property above described has been inspected by the Buyer or the Buyer's duly authorized agent; that the same is and has been purchased by the said Buyer as a result of said inspection and not upon representation made by the Seller or any selling agent, and said buyer hereby expressly waives any and all claims for damages by reason of any cancellation made by any selling agent or person whatsoever other than is contained in this contract for any inducement, promise, representation, agreement, condition or stipulation not set forth herein."

Plaintiff claims the evidence adduced by her was sufficient to establish that the representations made by defendants to her were false. These representations in effect were: First, that defendants would and could recover for her certain moneys she had invested with another firm if she would contract to purchase a lot from defendants; secondly, that defendants would employ plaintiff as a solicitor and that they would pay her enough to make the payments on the property purchased from them; and, thirdly, that if she would purchase the property here involved defendants would resell it for her in four weeks at a profit of \$3,000, and that plaintiff would not be required to pay any of the monthly installments upon the contract.

[1] We do not deem it necessary to set forth the evidence of plaintiff in support of these assignments, but suffice it to say, however, that such testimony was sufficient standing alone, to warrant a rescission, particularly in view of the rule recently declared in the case of Speck v. Wylie (Cal. Sup.) 36 P.(2d) 618. 95 A. L. R. 760, and Lozier v. Janss Investment Co. (Cal. Sup.) 36 P.(2d) 620, which opinions were handed down subsequent to the ruling by the trial court in this case, and the filing of the briefs herein. Those cases either overrule or practically nullify a number of the cases relied upon by respondent, both at the trial and upon this appeal. In the case of Specks v. Wylie, supra, the court had before it a contract containing language very similar to that found in the contract here before us and set forth by defendants in their amended answer as a special defense, and the court there held that where a person is induced to enter into a contract to purchase

real property through fraudulent representations made by the seller's agent, such person is entitled to rescind the contract and to recover the consideration paid even though the contract recites the property has been inspected by the purchaser and has been purchased as a result of such inspection and not upon representations made by the seller or his agent, and that the seller is not responsible for any inducements, promises, representations, or agreements not set forth in the contract.

[2] Neither do we at this time find plaintiff guilty of laches as to bar her claim for equitable relief. The testimony shows that after selling plaintiff the lot, one Thomas Ferguson, a salesman in the employ of defendant Reid, Incorporated, assured and reassured her after the expiration of the four weeks' period, he had a purchaser for the lot in question. The contract to purchase was entered into June, 1930. In October, at the request of plaintiff, Ferguson called upon her and said he had been ill, but again assured her she would get her money back or would take the lot over himself. These promises and assurances were repeated from month to month in various forms until plaintiff became dissatisfied and placed the matter in the hands of her attorney early in 1931, who then carried on negotiations until the filing of the complaint in October of that year.

The rule in such cases is clearly stated in the case of *Sherratt v. Hellman Commercial Trust & Savings Bank*, 112 Cal. App. 542, 297 P. 582, where fraud was discovered in October, 1925, and notice of rescission was filed approximately a year later, and an action thereon filed in January, 1927.

[3, 4] The general rule in such cases has been stated also by the Supreme Court in the case of *Reiniger v. Hassell*, 216 Cal. 209, 210, 13 P.(2d) 737, 738, as follows: "Where a party protests promptly on discovering that he has been defrauded in making a contract, and enters into negotiations for a peaceable settlement, which fail, a complaint filed within a reasonable time after such failure is not barred by laches. *Cooper v. Huntington*, 178 Cal. 160, 172 P. 591; *Bechtold v. Coney*, 42 Cal. App. 563, 183 P. 841; *Menefee v. Oxnam*, 42 Cal. App. 81, 183 P. 379; 2 Black on Rescission and Cancellation, § 544. There is no hard and fixed rule as to the lapse of time or circumstances that will justify the application of the doctrine of laches. Klein-

claus v. Dutard, 147 Cal. 245, 81 P. 516. The question of whether or not a party defrauded has rescinded promptly depends upon all of the facts and circumstances of the particular case, and this question is one primarily for the trial court to determine. * * *

We believe, in view of the foregoing, that the trial court was in error in granting the nonsuit, and the judgment is therefore reversed.

We concur: PLUMMER, J.; THOMPSON, J.



5 Cal.App.2d 218
In re BROWN.
Cr. 2694.

District Court of Appeal, Second District,
Division 1, California.
March 11, 1935.

Criminal law — 1001

Order of superior court admitting defendant to probation for three years after plea of guilty to statute penalizing driving while intoxicated, and providing as condition of such probation that defendant serve at county road camp during first two years of period, held authorized (Pen. Code § 19a, as added by St. 1933, p. 2217, § 1203; St. 1929, p. 537, § 112).

Application of Clifford L. Brown for a writ of habeas corpus.

Petitioner remanded to custody.

Gladys Towles Root, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and J. J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

PER CURIAM.

The petitioner is remanded to custody. It is the opinion of this court that the order of the superior court admitting the petitioner to probation for a period of three years after his plea of guilty of violation of section 112 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1929, p. 537), and providing as a condition of such probation that defendant serve at the county road camp during

the first two years of said probationary period, was an order made within the authority of the court. The condition thus imposed does not violate any provision of section 19a of the Penal Code, as added by St. 1933, p. 2217. See, also, section 1203 of the Penal Code, and particularly that paragraph thereof defining the court's power over punishment in connection with orders admitting to probation. There is nothing in section 112 of the California Vehicle Act which limits or changes the power of the court as above stated.



5 Cal.App.2d 353

PEOPLE v. MANGUS.

Cr. 2651.

District Court of Appeal, Second District,
Division 2, California.

March 19, 1935.

1. Infants ☞20

Evidence held sufficient to support conviction of committing lewd and lascivious acts with children (Pen. Code, § 288).

2. Criminal law ☞589(1), 977(3)

Refusal of defendant's request for continuance to secure another attorney and pronouncement of sentence on date set for hearing of probation application after conviction held not reversible error.

3. Criminal law ☞977(3)

Proceeding, in which trial court denied defendant's request for continuance to secure another attorney and pronounced sentence on date set for hearing of probation application two weeks after verdict of conviction was returned, held not too late (Pen. Code, §§ 1191, 1203).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

George C. Mangus was convicted of committing lewd and lascivious acts, and he appeals.

Affirmed.

Harry D. Hottel and Jesse R. Shafer, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Selbert L. Sefton, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted in two counts of violating section 288 of the Penal Code by committing lewd and lascivious acts upon the bodies of two little girls, aged eight and seven years, respectively, and from such judgment he appeals.

[1] From the testimony it appears that defendant met the children in a park and that they went down to a place near a bridge. One child kept watch on the bridge while the other went with defendant underneath it, where he committed lewd acts on her body. The girls then exchanged places and defendant committed similar acts on the other. Both children and defendant then participated in further similar acts. After his arrest defendant made conflicting statements to the officers concerning his acquaintance with the girls, and stated that the money which they claimed he had given them was taken by them out of his pocket. The jury was taken to the scene of the alleged acts and also had the opportunity to see and appraise the witnesses and determine what weight should be given to their testimony. Their determination of the question of defendant's guilt is supported by evidence which is clear and sufficient. A suggestion that the evidence shows the eight year old girl had been coached in her testimony is not supported by the record, when considered in its entirety.

[2] After conviction oral application for probation was made, but defendant failed or refused to sign the written application. When the case was called on the date set for hearing on probation, defendant appeared in court with his counsel and asked for a continuance to secure another attorney. He declared that his counsel had not handled the trial satisfactorily and had failed to take steps which defendant felt were necessary to an adequate defense. The court denied the request for continuance and indicated that counsel who had tried the case would be relieved of further responsibility. Defendant was then arraigned for sentence, reference was made to his failure to pursue his application for probation, and sentence was pronounced. The record does not indicate that the defense counsel left the counsel table or the room until sentence had been pronounced, or that he construed the court's order as being a peremptory direction to withdraw without waiting to at least observe the balance of the proceeding in which he was then appearing. On appeal appellant claims the trial court

erred in this proceeding, but no suggestion is made of any right invaded or prejudice suffered because of it. We are aware of no authority to support the reversal of a case under such circumstances.

[3] It is urged that the court should have denied probation in express terms before pronouncing sentence, but the language employed was unequivocal and defendant could not help knowing that in view of his failure to press his request for a probationary investigation the court had no alternative save to pronounce sentence. The assertion that this latter proceeding, which took place just two weeks after the verdict was returned, was too late, ignores the provisions of Penal Code, §§ 1191 and 1203.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 194

PEOPLE v. CASTILLO.

Cr. 307.

District Court of Appeal, Fourth District,
California.

March 8, 1935.

Hearing Denied by Supreme Court April
5, 1935.

1. Rape ☞57(1)

In rape prosecution, defendant's guilt held for jury.

2. Criminal law ☞1186(4)

In rape prosecution, defendant, owing to natural instincts of average jury, is so disproportionately at mercy of prosecutrix' testimony that he should be given the full measure of every legal right in an endeavor to maintain his innocence (Const. art. 6, § 4½).

3. Criminal law ☞485(1)

Hypothetical question may assume facts within limits of evidence, but must not be unfair or misleading.

4. Criminal law ☞485(1)

Hypothetical question, asked doctor, whether there would be anything inherently improbable from fact of accused having intercourse three times within 20 minutes, after prosecutrix had so testified, held prejudicial

error, where doctor had not examined accused or had knowledge of his physical condition, since question called for opinion as to defendant, and not as to a matter of general medical or physiological knowledge.

5. Criminal law ☞1186(4)

In rape prosecution, striking testimony of witnesses that accused's reputation for morality was good, after witnesses admitted on cross-examination they had not heard accused's reputation discussed, held prejudicial error, notwithstanding court later attempted to reinstate testimony, and instructed jury they might conclude that accused's reputation was good from fact that witnesses had not heard it discussed (Const. art. 6, § 4½).

6. Criminal law ☞785(12)

In rape prosecution, after testimony of witnesses who testified that accused's reputation for morality was good, instruction which attempted to reinstate testimony except as to statement that accused's reputation was good, and stated that jury might conclude accused's reputation was good from fact that witnesses had not heard it discussed, held erroneous.

7. Criminal law ☞379

Testimony of reputation witness that accused's reputation is good is admissible notwithstanding witness had not heard accused's reputation discussed in community in which accused resides.

8. Criminal law ☞1141(1)

Prejudice to warrant reversal of conviction must affirmatively appear from record, and cannot be presumed from mere fact of error.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Manuel Castillo was convicted of rape by force and violence, and he appeals.

Reversed and remanded for new trial.

Theodore Gottsdanker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

ALLYN, Justice pro tem.

The defendant was convicted of the crime of rape by force and violence. The principal points relied upon for reversal are three: First, that the testimony of the prosecutrix is so inherently improbable as to render it entirely unworthy of belief and hence that the evidence is insufficient to sustain the judgment; second, that it was error to admit ex-

pert testimony to the effect that it was not inherently improbable from a medical or physiological standpoint for the defendant to have accomplished the number of sexual acts testified to by the prosecutrix within the time stated by her; and, third, that the court was in error in its ruling upon defense testimony of the good reputation of defendant for chastity and morality.

The testimony of the prosecuting witness is of such a nature as to strain the credulity of an average man. She was a married woman, apparently of normal health and strength, although weakened somewhat by recent illness. She admitted having lived in adultery with two men prior to her marriage and having borne a child to each of them. By her testimony in the early evening, while walking on the streets of the small town of Stanton, in Orange county, she was seized by an unknown man who forced her to go with him to a vacant lot in the rear of an unoccupied house. He bent her backward until she fell to the ground and there, despite her struggles and cries for help, accomplished an act of sexual intercourse. She escaped from him but ran into a fence, was recaptured, and forced back to the same spot where the defendant in the same manner repeated his conquest. About five minutes elapsed between these two assaults. Then, not yet satisfied, the defendant, partly dragging the prosecutrix, forced her to walk about two blocks to another part of the village, where he again forced an act of intercourse upon her. These three assaults took place within the space of about twenty minutes. The prosecutrix then escaped upon the pretext that she would accept the defendant's invitation to go with him to Tia Juana, ran to her house, and made complaint to her husband. The latter, who was ill from a celebration earlier in the day, left the house and spent about five minutes in search of this man who had defiled his wife. There were marks and bruises upon witness' person when examined by a physician the next day. Three days later the prosecutrix pointed out the defendant to the arresting officers and identified him as her assailant.

[1, 2] However improbable the details of the story told by the prosecutrix may be, we are not prepared to say as a matter of law that the record, showing the defendant's denial of the charge and testimony in support of his defense of alibi, does not present a conflict of evidence and that it can be said that the evidence is insufficient to support the verdict. *People v. Biescar*, 97 Cal. App. 205, 275 P. 851. The foregoing statement of the essential de-

tails of the record is made in order to properly analyze the other specifications of error in relation to the provisions of section 4½ of article 6 of the Constitution. At the base of the discussion of this problem lie considerations arising from the inherent improbability of the story of the complaining witness, and properly so, because no proposition is more firmly imbedded in our criminal jurisprudence than that there is no class of prosecutions attended with so much danger or which afford so great an opportunity for the free play of malice and private vengeance. The defendant in such a case, owing to the natural instincts and laudable sentiments of the average jury, is so disproportionately at the mercy of the prosecutrix' testimony that he should be given the full measure of every legal right in an endeavor to maintain his innocence. *People v. Biescar*, supra; *People v. Baldwin*, 117 Cal. 244, 49 P. 186; *People v. Costa*, 24 Cal. App. 739, 142 P. 508; *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506.

The physician who examined the complaining witness and testified to her physical condition was permitted to answer the following hypothetical question over the general objection of the defense and the objection that the question did not contain a full statement of the evidence: "Doctor, assuming that on or about the 16th day of September of this year, and about 9:30 in the evening, that the defendant, the man farthest from me, was going along Chester avenue in the town of Stanton, and that at about this point marked 'G' he suddenly met Mary Martinez, and took her over to this point marked 'A,' which has been testified here indicates a vacant lot; that at that point the defendant had sexual intercourse with her, that he took Mary Martinez to this house, and there had an act of sexual intercourse with her by force, and that shortly thereafter she got away from the defendant, or was released from him, and ran a short distance, and ran into a fence, where the defendant overtook her, and then brought her back to this point marked 'A,' and again had sexual intercourse with her, about five minutes elapsing between the first act of intercourse and the second act of intercourse; that thereafter he again took the prosecuting witness over the course indicated by this red line, up to the point marked 'H' on this diagram, *People's Exhibit No. 1*, and that at that time he again had intercourse with her by force, about 15 minutes elapsing between that act of intercourse and the second act of intercourse that occurred here at the point 'A'; I will ask you, doctor, if from a medical

standpoint, or a physiological standpoint, there would not be anything inherently improbable from the fact of the defendant having intercourse three times within that period of time?"

[3, 4] It should be borne in mind that the doctor was testifying as an expert witness and not as a skilled observer. So far as the record shows she had never examined the defendant and had no knowledge of his physical or mental condition or of his sexual stamina or prowess. The question directs her opinion to the defendant and not to a matter of general medical or physiological knowledge. It is doubtful if this matter is a proper subject of expert testimony at all. *People v. Benc*, 130 Cal. 159, 62 P. 404. The jury were as competent to answer this question as any physician. A hypothetical question may assume any facts within the limits of the evidence but must not be unfair or misleading. *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25. The vice of the question was that in effect it called for the doctor's approval of the credibility of the testimony of the prosecutrix bearing upon a crucial element of the case and further that it omitted material parts of the evidence going to the circumstances surrounding the triple rape. An answer, based upon such a question, wholly fails to meet the demands of competent evidence. *Johnson v. Clarke*, 98 Cal. App. 358, 276 P. 1052.

[5-7] Three witnesses testified that the defendant's reputation for chastity and morality was good. On cross-examination each of them admitted that he had not heard the matter discussed. Thereupon, their testimony was stricken from the record and the jury instructed to disregard it. This was clearly error. *People v. Hoffman*, 199 Cal. 155, 248 P. 504. Was it cured by a later instruction by the court attempting to reinstate their testimony except as to their respective answers that his reputation was good, the instruction further stating that the jury might conclude that his reputation was good from the fact that these witnesses had not heard it discussed? This ruling was also erroneous. It does not necessarily follow from the fact that a witness has not heard another person's character or reputation discussed in the community in which he resides that he does not know

or cannot say that he knows such person's general reputation in that community for the traits of character germane to the inquiry. The fact that no reproach has been made or known to have been uttered against the character of a person known in a community may be the very best evidence that his reputation is good. *People v. Hoffman*, supra; *People v. Stennett*, 51 Cal. App. 370, 197 P. 372; *People v. Osterhelt*, 125 Cal. App. 723, 14 P.(2d) 140. The defendant was entitled to have the answers of these witnesses go to the jury.

[8] Prejudice cannot be presumed from the mere fact of error. It must affirmatively appear from a study of the record. The record in this case has been inspected minutely, and we are compelled to conclude that either or both of the errors complained of, in view of the weirdly improbable testimony of the prosecutrix, were prejudicial to the substantial rights of the defendant and that probably by reason thereof a verdict of conviction resulted. It may well be that the jurors followed the expert witness into the dim realm of medical and physiological probabilities and accepted her testimony as worthy of weight upon a matter that they were as competent as any one to determine. It is quite apparent that the record as to the evidence of defendant's good reputation would tend to confuse even a law trained, much less a lay mind. Any reasonable man might well conclude from the action of the court in striking this testimony from the record, and later attempting to reinstate a portion of it, that the opinion of these defense witnesses as to the defendant's good reputation was of no consequence and hence entitled to no weight. Where the scales of justice are so nearly at balance as in this case, an error, that in an ordinary case would be of no consequence, can easily result in a miscarriage of justice.

The other specifications of error have been considered and found insufficient to warrant comment.

The judgment is accordingly reversed, and the cause remanded for a new trial if such action is deemed proper by the prosecuting officer.

We concur: BARNARD, P. J.; MARKS, J.

4 Cal.App.2d 564

**EXCHANGE SECURITIES CORPORATION
v. RAINEY.**
Civ. 8496.

District Court of Appeal, Second District,
Division 1, California.
March 14, 1935.

Appeal from Superior Court, Los Angeles
County; Francis J. Heney, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 41 P.(2d) 225.

Shreve, Abbey & Shreve, of San Diego, and
D. P. Hatch, of Los Angeles, for appellant.

Sullivan, Roche, Johnson & Barry, of San
Francisco, for respondent.

PER CURIAM.

On petition for rehearing. In this petition it is suggested that this court, in the opinion filed, made some statements of fact which are "in direct conflict with the record." Also petitioner suggests extensive additions which he thinks the court should make, in order to have a more complete statement of the evidence. The record of the trial contains about 600 pages. The transactions were numerous, and the court was called upon to unravel a complicated history. As the opinion says, we attempted to give "a recital only of such evidentiary matters as we deem necessary for an understanding of the grounds for our conclusion."

In attempting thus to draw, from the record, the facts required for a statement of the case, it may be that our judgment was wrong concerning the effect of the evidence in some particulars. For example, we said: "For the \$500,000.00 note were pledged subscribers' notes totaling the full amount of \$500,000.00, and also," etc. On page 270 of the transcript there is testimony that there were not any notes put up as collateral with the principal note for that loan. There is evidence of "certificates" belonging to subscribers, which were used as such collateral, in addition to a 3332 share certificate pledged. (Transcript, pp. 250-251 and 137.) Apparently the clause above quoted, containing the statement that "subscribers' notes" were pledged for that loan, is not correct.

We are of the opinion, however, that the facts essential to a proper understanding of the case are substantially those set forth in the opinion, and that even if there be some

further defects in the statement, they are not such as would justify a rewriting of the opinion or a change in the decision.

The petition for rehearing is denied.



5 Cal.App.2d 297

WILLOUGHBY et al. v. ZYLSTRA et al.
Civ. 9490.

District Court of Appeal, Second District,
Division 2, California.
March 18, 1935.

1. Evidence ⇨268

Complaints made by injured party to either medical or lay witness of present pain and suffering are not inadmissible as hearsay.

2. Evidence ⇨555

Declarations and statements made to medical expert by injured party of previous condition and past suffering, when declared by expert to be necessary to enable him to form opinion as to nature and extent of injury, where such statements constitute part of basis upon which opinion of expert is based are admissible to serve as basis for opinion of expert, but not for purpose of establishing truth of statements.

3. Evidence ⇨268

Statements made by injured party to medical witness when witness examined her at time of trial for purpose of forming and giving opinion as to injured's physical condition held not inadmissible as hearsay, where statements included complaints of present pain and suffering, showed present symptoms, and gave a history of injuries, including some history of past pain and suffering.

4. Appeal and error ⇨970(2)

Trial ⇨27

Reception of evidence by way of demonstration, like that produced by experiment, lies primarily in discretion of trial court, and order admitting such evidence will be reversed only in case of plain abuse of discretion.

5. Trial ⇨27

Permitting medical witness to physically manipulate his fingers upon injured party's neck and to pinch the cervical vertebrae of injured person in presence of jury held not abuse of discretion.

6. Appeal and error ⇨1004(1)

Reviewing court will not set aside verdict as excessive unless it appears that

amount awarded is so grossly disproportionate as to shock the sense of justice and raise a strong presumption that verdict was based on prejudice or passion.

7. Trial ⇨133(6)

Statement of plaintiffs' counsel that reason he had not called physicians who treated plaintiffs was that because of continuances they were on vacations when trial was called *held* not reversible error, where court told jury to disregard statement, and later instructed jury to disregard any statement made by attorneys unless it amounted to a stipulation or argument.

8. Appeal and error ⇨1060(1)

Misconduct of counsel, in argument to jury, must be of a willful or persistent nature to constitute reversible error.

9. Automobiles ⇨187

Under statute imposing liability on governmental units for torts arising out of exercise of purely governmental functions, city *held* liable for injuries to plaintiffs from collision between automobile in which they were riding and one owned by city, which was negligently driven by employee thereof during course of his employment and work in oiling streets of city (Civ. Code, § 1714½).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Joint action by M. L. Willoughby and another against Harry Zylstra and another. From a judgment in favor of plaintiffs, defendants appeal.

Affirmed.

E. P. Mulholland, Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for appellants.

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, and C. Ransom Samuelson, of Long Beach, for respondents.

WILLIS, Justice pro tem.

Plaintiffs, respondents herein, joined in an action for damages for personal injuries suffered as a result of a collision between the automobile in which they were riding and one belonging to the appellant city of Signal Hill, a municipal corporation, and operated at the time of such collision by appellant Harry Zylstra, an employee of said municipal corporation, during the course of his employment and work of oiling streets of the city. The cause was tried before the court with a jury, and by separate verdicts each plaintiff was awarded damages in the sum of \$5,000. No

question of responsibility among the individuals participating in the collision is raised herein, the jury's implied findings in that respect being recognized as conclusive on this appeal; but appellants contend that certain rulings of the court on admission of evidence are prejudicially erroneous, that the damages awarded are excessive, that counsel for respondents was guilty of prejudicial misconduct in his closing argument, and that the appellant city of Signal Hill is not liable for acts of negligence of its servant done in the performance of duties which are governmental in their nature.

[1-3] Respondents called as an expert medical witness a physician who, after being qualified as an expert, related the statements made to him by respondent Ruby Arnett during in examination he made of her during the progress of the trial for the purpose of forming and giving an opinion, as an expert witness, as to her physical condition. Counsel for appellants repeatedly objected to admission of such statements on the ground that they were hearsay; such objections being addressed to all the statements made by such respondent. The statements embraced complaints of present pain and suffering, including those showing present subjective symptoms, and the history of her injuries, including some history of past suffering and miseries. On the trial of cases for damages for personal injuries complaints by the injured party of present pain and suffering are admissible on proper foundation as evidence through the medium of either medical or lay witnesses. *Bloomberg v. Laventhal*, 179 Cal. 616, 178 P. 496; *Kimball v. Northern Electric Co.*, 159 Cal. 225, 231, 113 P. 156. Declarations and statements, made to an examining expert by an injured party, of previous condition and past suffering, when declared by the expert to be necessary to enable him to form an opinion as to the nature and extent of disease or injury, and when such statements constitute in part the basis upon which the opinion of the expert is based, are admissible, not for the purpose of establishing the truth of the statements, but to serve as a basis for the medical opinion the expert is about to give. *People v. Shattuck*, 109 Cal. 673, 42 P. 315; *Davis v. Renton*, 113 Cal. App. 561, 298 P. 834; *Rohner v. Cross*, 121 Cal. App. 667, 9 P.(2d) 509. We have examined the record herein and find nothing in the relation of past history that transcends the rule above announced; and it appears from such record that the witness declared that a relation of what the patient told him

was important in the light of his physical findings and opinions.

[4, 5] During the trial, over appellant's objection, a medical witness was permitted to physically manipulate with his fingers upon the neck, and to pinch the cervical vertebrae of respondent Ruby Arnett, in the presence and view of the jury. The record discloses that it consisted in a medical examination of the injured parts and amounted to what might be termed a demonstration before the jury. On the face of the record of trial, such proceedings appear innocent of anything improper or prejudicial. However, affidavits of appellants used on their motion for a new trial revealed that the effect, as manifested to the jury, of the manipulation and pinching on respondent consisted in cringing and twisting of her body with accompanying registration of pain by her facial expression and contortion. The reception of evidence by way of demonstration, like that produced by experiment, lies primarily and largely in the discretion of the trial court; and it would only be in case of a plain abuse of such discretion that an appellate court would interfere. *People v. Parker* (Cal. App.) 41 P.(2d) 836; *Jones on Evidence*, sec. 406; *Stephens v. Elliott*, 36 Mont. 92, 92 P. 45; *Herter v. City of Detroit*, 245 Mich. 425, 222 N. W. 774. While permission to produce evidence by demonstration of physical condition or pain in the presence of the jury might open the door to deception or encourage malingerings, or to unduly arouse the sympathy of the jury, and therefore require a greater degree of care on the part of the trial judge in exercising the discretion vested in him, still such contingencies in and of themselves are not recognized as sufficient to forbid the reception of such evidence in cases such as this. Herein the so-called demonstration occurred as the apparently natural result of a physical examination and manipulation of the injured parts. Its value and weight as evidence was for the jury's consideration. On motion for new trial the subject in question was fully dealt with by counsel and the court, and the motion was denied. The court heard and saw the whole transaction and had opportunity, and was in a situation peculiarly favorable, to weigh the same and determine if it resulted in any prejudice to appellants. We find no basis in the record warranting the substitution of the discretion of this court for that of the trial court, exercised not once but twice under most favorable circumstances. *Mirabito v. San Francisco Dairy Co.* (Cal. Sup.) 35 P.(2d) 513.

[6] In respect to appellants' claim of excessive damages, it is the recognized rule in this state that before a reviewing court may set aside a verdict as excessive it must appear that the amount awarded by such verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment. *Ware v. McPherson*, 213 Cal. 120, 1 P.(2d) 433; *Hart v. Farris*, 218 Cal. 69, 21 P.(2d) 432. The fact that the trial court denied a motion for new trial on the ground of excessive damages, among others, is persuasive and confirms us in our conclusion from a review of the record that the verdicts herein may not be declared excessive.

[7, 8] During his closing argument counsel for respondents stated that the reason he had not called two physicians who had attended and treated plaintiffs after the accident was that, because of continuances of this case for trial, those witnesses were away on their vacations when the case was called for trial. This was assigned as misconduct, and a statement of fact not based on any evidence in the case. The court at once admonished the jury to disregard the statement of counsel, and later in its instructions charged it to disregard any statement of the attorneys during the progress of the case unless it amounted to a stipulation or argument. There was no misconduct in the remarks of counsel of that willful or persistent nature which is necessary to constitute reversible error; and if there was any impropriety in the remarks made it was presumably cured by the prompt and clear admonition of the court. *Tingley v. Times Mirror Co.*, 151 Cal. 1, 23, 89 P. 1097.

[9] Appellants finally contend that the city of Signal Hill, a municipal corporation, was not liable for the negligent acts of its servant, done in the performance of duties which were governmental in their nature. The present action is founded on the provisions of section 1714½ of the Civil Code, which in its pertinent parts is as follows: "Hereafter * * * every * * * municipal corporation * * * owning any motor vehicle shall be responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by an officer, agent, or employee or as the result of the negligent operation of any other motor vehicle by any officer, agent or employee when acting within the scope of his office, agency or

employment." This section, enacted in 1929, was designed to remove the state and all political subdivisions and municipal corporations from the well-settled rule of nonliability in cases of tort arising out of the exercise of purely governmental functions, and to place upon those public bodies a liability for tort whether the damage arises in the performance of governmental or proprietary functions. *Armas v. City of Oakland*, 135 Cal. App. 411, 420, 27 P.(2d) 666, 28 P.(2d) 422; *Heron v. Riley*, 209 Cal. 507, 514, 289 P. 160; *Chilcote v. San Bernardino County*, 218 Cal. 444, 23 P.(2d) 748; *Bates v. Escondido Union High School District*, 133 Cal. App. 725, 728, 24 P.(2d) 884. Under the section quoted, and its interpretation and application by our appellate courts, it is obvious that the appellants' contention is without merit.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 165

HOLLAND et al. v. CITY OF HERMOSA BEACH.
Civ. 8989.

District Court of Appeal, Second District,
Division 1, California.
March 7, 1935.

Eminent domain ☞285

Owners of lot fronting on lane, opposite line of which was boundary between two cities, could not recover damages from other city than that in which lot was located for falling away of opposite portion of lane because of excavation, made by former city, in changing street grade wholly within boundaries thereof and loss of access to such street as result of city in which lot was located cutting new street across lane at lower grade (Gen. Laws 1931, Act 8199).

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Parke D. Holland and another against the City of Hermosa Beach. Judgment for defendant, and plaintiffs appeal.

Affirmed.

James P. Mackel, and Donald M. Keith, both of Los Angeles, for appellants.

Art Smith, of Hermosa Beach, and Phil S. Gibson, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

The appellants brought their action for damages to real property, which they allege was caused by a change of grade of a public street. They are the owners of a lot in the city of Manhattan Beach, fronting on the north side of Gould lane, which, before the improvement complained of, was an unimproved public street 20 feet in width running in a general easterly and westerly direction. The southerly line of Gould lane is the common boundary line between the cities of Manhattan Beach and Hermosa Beach. Prior to the acts complained of, El Camino Real, a public street of Hermosa Beach, extended in a northerly direction, meeting Gould lane at approximately a right angle in front of the westerly 30 feet of plaintiffs' property. Some 200 feet to the west of this junction, a street of the same name in Manhattan beach extended northerly. The principal means of ingress and egress to and from plaintiffs' property before the change of grade was westerly over Gould lane and thence into El Camino Real.

In December, 1929, the city of Hermosa Beach commenced proceedings under the Improvement Act of 1911 (Deering's Gen. Laws, 1931 Ed., Act 8199) to change the grade of and improve El Camino Real. Pursuant to such proceedings, the grade was cut down approximately 14 feet at its northerly terminus at Gould lane, and paving and curbs were constructed on the new grade. Gould lane, after the completion of the work, was closed to travel westerly from a point opposite appellants' property, but giving them access to it. Thereafter they were obliged to travel east on Gould lane to Prospect avenue, which extends in a northerly and southerly direction parallel with El Camino Real and some 500 feet easterly therefrom.

Some six months after the improvement of El Camino Real, the city of Manhattan Beach opened and extended a street known as Sepulveda boulevard in a southerly direction to join with El Camino Real at Gould lane. This provided a continuous new highway passing within 25 feet of appellants' property. However, appellants' property now lay some 18 to 20 feet above this boulevard, with no means of access to it by way of Gould lane, for the reason that the latter was not graded down to connect with it.

The trial court found that, after these improvements were made, appellants had means of ingress and egress from their premises by going in an easterly direction on Gould lane to Prospect avenue. It also found that plaintiffs' property was not damaged and its value was not depreciated by the improvements, but, on the contrary, the property was benefited by the improvements and its value increased. Judgment was accordingly entered in favor of the defendant.

Appellants do not challenge the finding of fact that the improvements made by the city of Hermosa Beach were made wholly within the boundaries of that city and that it made no excavations in or upon Gould lane. It is therefore apparent that the damage of which the appellants complain did not result from any act of the defendant city. The evidence shows that the southerly portion of Gould lane fell away to some extent because the excavation of the city of Hermosa Beach removed its lateral support. The possibility of travel westerly on Gould lane, aside from the damage to the street by the excavation along its southerly line, was taken away by the act of the city of Manhattan Beach in cutting a new street across Gould lane at a different grade. No actionable damage is shown to have resulted by reason of any act of the defendant city of Hermosa Beach, and the city of Manhattan Beach is not a party defendant.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



5 Cal.App.2d 115

BLANCHARD v. SUPERIOR COURT OF
LOS ANGELES COUNTY et al.

Civ. 10201.

District Court of Appeal, Second District,
Division 1, California.

March 5, 1935.

Hearing Denied by Supreme Court

May 3, 1935.

Corporations $\Leftrightarrow$ 630(3½)

In action against individual defendants, including corporation which was in process of liquidation, denying motion to make liquidator a party defendant *held* error, where claims against corporation and liquidator were identical and denial of motion would re-

quire plaintiff to try twice a cause of action on same claim.

Mandamus by Annie Blanchard, by Charles Gardner, as guardian of her estate, against the Superior Court of Los Angeles County, State of California, and Emmet H. Wilson, as Judge thereof.

Writ granted.

C. Ibeson Sweet, of Los Angeles, for petitioner.

Eugene P. Fay, of Los Angeles, for respondents.

PER CURIAM.

The question involved herein is whether the superior court should be directed to permit petitioner to amend her complaint in a certain action theretofore commenced by her, by including in such action as a party defendant the name of the liquidator of a corporation which was one of the original defendants in the action thus commenced by the plaintiff.

It appears that the alleged cause of action was brought against nine separate defendants therein named, including a corporation which at that time was in process of liquidation. After the action had been commenced, the plaintiff presented to the liquidator of the corporation a claim against it which was identical with the cause of action embraced within the action in which the corporation theretofore had been made a party defendant—which claim was by the liquidator rejected. Thereupon, by means of a motion presented to the superior court in said action the plaintiff sought leave to make the liquidator a party defendant therein, which motion was by the court denied, assumedly on the ground that the proper relief afforded the plaintiff was by means of a proceeding in the matter of the liquidation of the corporation.

It is evident that, in view of the fact that eight other persons were individual defendants in the action theretofore brought by the plaintiff, if in addition to her said action to recover a judgment against each of said defendants the plaintiff must prosecute a second action to recover against the corporation defendant or its liquidator, then the plaintiff would be obliged to try her cause twice; whereas, if the liquidator should be included as a party defendant in such action, but one trial thereof would be necessary.

The situation here presented is analogous to one in which a receiver has been appointed. In the case of *De Forrest v. Coffey*, 154 Cal. 444, 98 P. 27, 30, wherein it appeared that a creditor of an insolvent bank had been denied leave to file an independent action against the receiver of the bank, it was held: "When the court cannot afford the same relief in intervention as a claimant would be entitled to in an independent action, * * * the court will undoubtedly grant leave to bring it, and it would be an abuse of discretion not to do so." And the ruling there made was affirmed in the later case of *Auzerais v. Coffey*, 155 Cal. 102, 99 P. 1134.

In the instant circumstances, aside from the possible application of the rule that relates to the avoidance of a multiplicity of actions, it is obvious that in the interest of the efficient administration of justice and the dispatch of the business of the court the motion of the plaintiff should have been granted.

The superior court is directed to set aside its order by which the plaintiff was denied the right to make the liquidator a party to the action theretofore commenced by the plaintiff, and instead of its said original order, to enter its other order therein by which the plaintiff may be granted leave to make E. Forrest Mitchell, as such liquidator, a party to said action.



5 Cal.App.2d 270

ANGEL v. LOS ANGELES GAS & ELECTRIC CORPORATION.

Civ. 8742.

District Court of Appeal, Second District,
Division 1, California.

March 15, 1935.

Hearing Denied by Supreme Court
May 13, 1935.

1. Appeal and error ☞1064(1)

Where misdirection of jury in law of contributory negligence might lead to different conclusion than would be reached under proper instructions, law should be stated with sufficient exactness to leave no doubt upon the subject.

2. Trial ☞296(4,5)

Instruction that motorcyclist, who ran into unlighted and unguarded excavation, had

right to assume that electric company had erected guards, barricades, and lights as required by ordinance, *held* not prejudicial error as ignoring issue of contributory negligence in view of other instructions regarding motorcyclist's headlights and rate of speed which sufficiently informed jury of defense of contributory negligence (St. 1923, p. 550, § 103; St. 1927, p. 1433, § 101).

3. Negligence ☞122(1)

Merely charging plaintiff with affirmative acts of negligence does not establish his guilt, and does not deprive plaintiff of benefit of legal principle that plaintiff had right to rely upon defendant's observing law, so long as plaintiff did not carry that assumption beyond limits of prudence and caution.

4. Appeal and error ☞930(1)

On appeal from judgment on verdict in favor of plaintiff, testimony of plaintiff and his witnesses would be taken as true.

5. Automobiles ☞306(1)

Evidence *held* to support verdict in favor of motorcyclist suing electric company for injuries sustained in running into unlighted and unguarded excavation in street.

Appeal from Superior Court, Los Angeles;
Douglas L. Edmonds, Judge.

Action by George N. Angel, by Isabella Angel, his guardian ad litem, against the Los Angeles Gas & Electric Corporation. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Paul Overton, Douglas Van Dyke, and Neil G. Locke, all of Los Angeles, for appellant.

Charles R. McCarty and Clyde C. Triplett, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

This is an appeal by defendant, Los Angeles Gas & Electric Corporation, from a judgment after verdict in an action for personal injuries. Plaintiff, a youth of 19, recovered judgment for damages suffered when he allegedly ran his motorcycle into an unlighted and unguarded excavation which defendant had made in a public street. Three points are urged for reversal, namely: That the evidence was insufficient as a matter of law to support the verdict; that plaintiff was guilty of contributory negligence; and, lastly, error in an instruction given to the jury. While the points are discussed in the briefs in the order stated, we shall first take up the alleged error in the instruction.

[1, 2] The instruction complained of reads as follows: "You are instructed that in operating his motorcycle upon Washington boulevard at the time of the happening of the accident in question the plaintiff, George Angel, had the right to assume that the defendant, Los Angeles Gas & Electric Corporation, had complied with the law and the ordinance of the city of Los Angeles, which has been introduced in evidence, and in this particular, the plaintiff had the right at said time to assume that the defendant, Los Angeles Gas & Electric Corporation, had erected and maintained such guards, barricades and lights as were required by said ordinance of the city of Los Angeles and such as would be constructed under like circumstances by an ordinarily prudent and careful person to warn one lawfully using the street in the night time of the existence, location and limits of the excavation in said Washington boulevard."

It will be seen that the instruction given omits all reference to the question of contributory negligence and is in itself an incomplete and inadequate statement of the law. Other instructions to which we shall later refer were given at the request of defendant, which stated the law sufficiently to inform the jury as to the defense of contributory negligence. If we can say with assurance that the jurors must have understood that such other instructions qualified the specific instruction and that the instructions as a whole were understood by the jurors with the same effect as if the specific instruction had been complete in itself, then the error must be held to have resulted in no prejudice to the defendant. If, on the other hand, we are unable to say that the instructions as a whole were clear and not subject to misconstruction by an untrained and inexperienced mind, then the error was prejudicial to the defendant and the judgment should be reversed.

A brief statement of the manner in which the accident occurred will illustrate the application of the several instructions. Plaintiff was traveling westerly on Washington boulevard at 8:30 or 8:45 in the evening. From a distance of about half a block away he observed red lights in the street. Some of these admittedly were placed upon a pile of dirt taken from an excavation which was some three by four feet in size and several feet deep between the north rail of the west-bound track and the north curb and far enough from the latter to allow vehicles to pass to the north thereof. The excavation in question was located in the intersection of Washington boulevard and New England street and was the most easterly of a series

of like excavations in Washington boulevard. Plaintiff's theory of the case was that, while the pile of dirt was lighted and barricaded, the excavation was not, and that in attempting to pass to the right or north of the dirt pile he ran into the excavation and was thrown from his motorcycle. There was a decided conflict in the evidence as to the exact location of the dirt pile or piles with reference to the excavation and whether the excavation was barricaded or lighted and whether plaintiff's motorcycle struck the excavation at all in traveling to the northwest corner of the intersection. There was testimony on behalf of plaintiff that the excavation at the scene of the accident was neither barricaded nor lighted. This testimony was contradicted by that of defendants' witnesses, who testified that there were piles of dirt on each side of the excavation, except the north side, and that the barricade surrounded not only the dirt piles but the excavation as well; that they were lighted with some ten or twelve red lanterns; and that the barricade was standing intact with the lights still burning after the accident. Defendant's theory of the accident was that the motorcycle passed to the north of the excavation, missing it entirely, and that plaintiff's fall was caused by his losing control of his motorcycle and running into the curb. One of defendant's witnesses testified that plaintiff gave such a version of the accident. There was evidence also to the effect that the headlight on plaintiff's motorcycle was located thirty-five inches above the pavement. Plaintiff testified that the rays from this light hit the pavement at from fifteen to twenty-five feet ahead of the motorcycle. The law applying to headlights on motorcycles which was in effect at the time of the accident required that the maximum beam or intensity of light should not exist lower than two degrees of arc below the level of the lamp. By a mathematical computation defendant shows that the center of a light so adjusted would strike the pavement seventy or eighty feet ahead. There was also a provision of the California Vehicle Act (St. 1923, p. 550, § 103, and page 546, § 101, as amended by St. 1927, p. 1433) to the effect that it was lawful to so construct and equip a lamp that the beams of light could be deflected downward not more than two additional degrees, making five degrees in all. A lamp so adjusted would throw the center of the beam on the pavement some thirty-four feet ahead. The alleged maladjustment of the light on plaintiff's motorcycle was relied upon by defendant as establishing contributory negligence upon his part. As opposed to this

testimony regarding the adjustment of the lamp was the statement of plaintiff based upon an experience of several years in riding motorcycles as a messenger, that the light had a "regular adjustment." These references to the facts are sufficient to show that the defense of contributory negligence urged by defendant was not without support in the evidence and that a finding of the jury that the defense had been sustained would not have been unsupported. The case is therefore one in which the misdirection of the jury in the law of contributory negligence might have led to a conclusion different from one that would have been reached under proper instructions. In such cases it is imperative, in order that juries be not led into error, that the law should be stated with sufficient exactness to leave no doubt upon the subject.

Upon the subject of contributory negligence the court gave not only general instructions but certain special instructions. One of these quoted the provisions of the California Vehicle Act relating to headlights upon motorcycles substantially as the law is hereinbefore stated; the concluding portion of this instruction read as follows: "In other words, plaintiff was bound to observe and comply with the provisions of the act referred to, and if you find from a preponderance of the evidence that he did not have his headlights adjusted properly so as to comply with the act, and that as a proximate result thereof the accident occurred, then, regardless of how negligent defendant may have been, plaintiff was guilty of such negligence as will bar him from recovering any damages whatsoever."

Another instruction set forth certain other provisions of the California Vehicle Act relating to the lawful speed of vehicles, following which the following language was used: "If you find from the evidence that plaintiff was not, at said time and place, operating his motorcycle at a careful and prudent speed not greater than reasonable or proper under all the circumstances, including the amount of traffic on the street and the nature of the surface and the width of the street, then, I instruct you, plaintiff was guilty of negligence as a matter of law, and if you further find that such negligence was a proximate cause of the accident herein concerned and the damages resulting therefrom, plaintiff is precluded from any recovery, and your verdict must be for the defendant."

These two instructions called particular attention to the alleged improperly adjusted headlight relied upon by defendant in sup-

port of its defense of contributory negligence, and properly instructed the jury that it was the duty of plaintiff in determining what would be a careful and prudent speed, to take into consideration all the circumstances under which he was using the highway and the conditions which he encountered at the time of the accident. If the jurors in the proper discharge of their duties would necessarily have read these instructions with the one criticized and would have understood therefrom that plaintiff could not recover if the accident was caused in part by his imprudent speed or the improperly adjusted headlight, then, notwithstanding the instruction that he had a right to assume that defendant itself was complying with the law, the jury was properly and sufficiently informed that plaintiff was not excused under any circumstances from driving at a careful and prudent speed, or from having his motorcycle equipped with a headlight which complied with the requirements of the law. We are satisfied that the instructions would have been so read and understood by the jury. In order to reach a different conclusion we would have to assume that the jurors would understand from the several instructions that plaintiff in reliance upon defendant's compliance with the terms of the city ordinance was thereby excused from driving at a prudent speed and from having a headlight upon his motorcycle which did not comply with the law. Such an assumption we think would be wholly unwarranted. We conclude, therefore, that by these instructions the jury was as adequately instructed on the subject as they would have been had the three instructions been given as one, and that so far as the questions of speed and lights are concerned there was furnished the qualification required to complete the insufficient instruction complained of. We look to the record for other evidence of alleged negligence which might have been relied upon by defendant as establishing plaintiff's contributory negligence. We find nothing which could be urged as establishing such negligence, unless it should be argued that even though the excavation was left unguarded and unlighted, and assuming that plaintiff was traveling at a careful and prudent speed, with an adequate headlight on his motorcycle, he should have observed the open excavation in the street in time to have avoided it. No such argument is presented on the appeal in support of the defense of contributory negligence, and we think it was a minor issue at the trial. Plaintiff was traveling at night on the right-hand side of the street and, as found

by the jury, at a careful speed and with a properly adjusted headlight. He observed the red lanterns when he was half a block away and was thereby warned of his danger. If plaintiff's witnesses were believed, as they undoubtedly were, the warning barricade and lights were maintained by defendant over a part but not all of the dangerous area. These facts would show a clear case for an instruction to the jury that defendant might properly have been assumed to be maintaining warnings of the danger as required by the city ordinance; they show, in fact, a case in which the assumption that defendant had complied with the law might properly have been carried to extreme limits. We think it would be quite unusual under such circumstances for a user of the street to assume that the defendant, having taken precautions to safeguard a part of the dangerous area, would leave an excavation in the street unguarded and unlighted. We have made an extensive examination of the record, from which it is disclosed that the evidence on both sides was directed solely to the question whether any warnings were maintained around the excavation. This was the only issue as to defendant's negligence raised by the amended complaint and this was the issue that was tried. No evidence was offered by defendant for the apparent purpose of showing that if the excavation was in fact unguarded and unlighted yet it could have been seen by plaintiff in the use of ordinary care. Upon the contrary, plaintiff's evidence was to the effect that immediately to the east of the hole on the side from which plaintiff made his approach there was a pile of dirt upon or in front of which was a barricade made of one by six planks. It is true that the defendant had the right to urge in its defense that plaintiff was negligent in not seeing the hole in time to avoid it, even though it was in the condition described by plaintiff's witnesses. Defendant is entitled to the full benefit of this defense, no matter how difficult it may have been to sustain the argument. But we have pointed out that by the two particular instructions, which we have quoted, the jurors were told that they should not understand that plaintiff was excused from complying with the law himself and that his failure so to do, if it contributed to the happening of the accident, would establish a valid defense. The court gave numerous other instructions to the effect that plaintiff was required to act as a reasonably prudent man would under the same or similar circumstances, and that at the time of and previous to the accident it was his duty to use ordinary care, caution and protection for his

own safety. We can reach no conclusion other than that the instructions taken as a whole mean, and were understood by the jury to mean, that while plaintiff had the right to assume that defendant had complied with the law, it was yet his duty to exercise his faculties to a reasonable and prudent extent to observe and acquaint himself with any failure of the defendant so to do. Defendant's rights were therefore amply protected and the verdict in favor of plaintiff was not the result of misdirection of the jury as to the proper application of the law of contributory negligence. The authorities support these views.

[3] Appellant relies strongly upon the case of *McPherson v. Walling*, 58 Cal. App. 563, 209 P. 209, 210, and upon *White v. Davis*, 103 Cal. App. 531, 284 P. 1086, and *Roller v. Daleys Incorporated*, 219 Cal. 542, 28 P.(2d) 345. These were all cases in which instructions similar to the one under consideration were given; they either ignored or insufficiently stated the contributory negligence doctrine. In *McPherson v. Walling* it is said to be improper to give an instruction as to the right of one person to rely upon the exercise of care by another in any case in which the lawfulness of the former's acts is in question. The decision of the case, however, was not based upon that broad ground, but upon the proposition that "the instruction before us does not leave it to the jury to decide from all the facts and circumstances in evidence whether or not the plaintiff had a right as a reasonable man to expect that the defendant would perform his legal duty. It forecloses it from deciding the question for itself." It is to be observed that merely charging plaintiff with affirmative acts of negligence does not establish his guilt, nor should it deprive him of the benefit of the legal principle that he had a right to rely upon the defendant's observing the law, so long as he himself did not carry that assumption beyond the limits of prudence and caution. It is proof of negligence, not merely its assertion, that destroys his right to rely upon the exercise of care by other persons.

In the *McPherson Case* there were no general or special instructions on contributory negligence. In *White v. Davis* and *Roller v. Daleys, Incorporated*, supra, the court considered specific instructions and held that they were insufficient under the particular facts involved, and should have been amplified so as to fully incorporate therein the elements of the contributory negligence doctrine, without which they would be mislead-

ing to the jury. In neither of these cases was the jury instructed in that doctrine as it was in the instant case. An authority much more in point is *Forrest v. Pickwick Stages System*, 101 Cal. App. 426, 281 P. 723, in which the jury had been instructed that plaintiff had a right to presume that another motor vehicle operating on the highway would be lawfully propelled in accordance with the California Vehicle Act. The court there considered numerous instructions on contributory negligence and reached the conclusion that it did not seem possible that the jury could have understood that the plaintiff was not obliged to use every reasonable and ordinary precaution for his own safety, even though the stage displayed no headlights. The case in hand falls within the doctrine of this authority, which is supported by *DeLannoy v. Grammatikos*, 126 Cal. App. 79, 14 P.(2d) 542, and *Hoy v. Tornich*, 199 Cal. 545, 250 P. 565. In these cases similar instructions were considered, and it was held that the instructions on contributory negligence must be presumed to have removed any prejudicial effect of the instructions of which complaint was made.

It would have been better no doubt if the instruction complained of, in stating the rule as it did, had also stated the proper exceptions and qualifications. The practice followed of giving an instruction incomplete in itself, relying upon general instructions on contributory negligence to supply the deficiency, is not to be commended. It does not tend toward clearness, nor does it minimize the chances of error as far as possible, but it is not necessarily prejudicial error.

[4, 5] We cannot agree with appellant's contention that the verdict lacks substantial support in the evidence. The testimony of plaintiff and his witnesses was not incredible. It was within the province of the jurors to accept it or reject it. They undoubtedly believed it, else they could not have found defendant to be negligent. Taken as true, as it must be on this appeal, it supports the verdict. As to the alleged unlawful adjustment of the headlight on the motorcycle, which defendant claims to have proved and thereby to have established contributory negligence on the part of plaintiff, we think the jury clearly had the right to regard the proof relied upon by defendant to be insufficient. The only evidence as to the adjustment of the headlight was furnished by the testimony of plaintiff himself, consisting of inaccurate estimates made upon casual observation and from memory. Plaintiff's testimony as to the distance to the point where the beams of light

struck the pavement did not relate to the center of the beam or the maximum intensity of the light, which is the thing regulated by the California Vehicle Act. We think the evidence was too uncertain to justify the jurors in finding that the center beam of light struck the pavement closer to the lamp than was permitted by law. The jurors had the right to believe, as plaintiff also testified without objection, that the light had the regular adjustment and to conclude therefrom that it was not adjusted at an unlawful angle. The case was fully and fairly presented to the jury and does not call for a retrial.

For the foregoing reasons the judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



5 Cal.App.2d 314
PEOPLE v. BONNER et al.
 Cr. 283.

District Court of Appeal, Fourth District,
 California.
 March 18, 1935.

Hearing Denied by Supreme Court
 April 26, 1935.

1. Criminal law ☞511(2)

Evidence corroborating accomplice's testimony need not be sufficient to support conviction, and may be slight and, standing alone, entitled to little consideration, but it must tend to connect accused with commission of offense charged (Pen. Code, § 1111).

2. Criminal law ☞511(3)

Circumstantial evidence held sufficient corroboration of testimony of complaining witness, who was an accomplice, to sustain conviction of criminal offenses (Pen. Code, § 1111).

3. Criminal law ☞1173(2)

Error in refusing to instruct that complaining witness was an accomplice and in leaving question to jury held not to require reversal, where jury was given correct definition of accomplice and was informed regarding requirement of corroboration of accomplice's testimony (Pen. Code, § 1111; Const. art. 6, § 4½).

4. Criminal law ☞1144(15)

Reviewing court may assume that jury followed and properly applied instructions given.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Thomas J. Bonner and another were convicted of certain specified criminal offenses, and they appeal.

Affirmed.

Edgar G. Langford, of San Diego, for appellants.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The defendants appeal from a judgment rendered in conformity with the verdict of a jury whereby they were found guilty of certain specified criminal offenses and from the trial court's order denying their motion for a new trial. Reversal of the judgment is here sought on two grounds: First, that the verdict is lacking in evidentiary support; and, second, that the trial court erred in refusing to give a certain instruction requested by defendants and in giving a specified instruction.

In support of their contention of evidentiary insufficiency, it is urged that the complaining witness was clearly an accomplice of the defendants in the commission of the offenses and that the testimony of this witness was not sufficiently corroborated.

For the purposes of this opinion, it may be assumed that the complaining witness was an accomplice. Examination of the record produces a conviction that such an assumption is not unduly violent. Indulgence in the assumption leaves to be determined the question of whether or not it may fairly be declared that the testimony of the witness was sufficiently corroborated by other evidence produced during the trial.

[1, 2] The evidence upon which respondent relies as affording sufficient corroboration is wholly circumstantial. It may be epitomized briefly as follows: First, the discovery of certain articles of clothing at the place where the complaining witness testified he had dropped them on the evening the offenses were committed and very shortly thereafter; second, the result of a chemical analysis of certain substances found on the abandoned clothing which tended to substantiate the testimony of the complaining witness regarding an incident which took place immediately after the commission of the offenses; third, the physical condition and appearance of the complaining witness approximately nine hours after the commission of the offenses as narrated by the complaining witness; fourth,

the discovery on the day following the commission of the offenses of certain marks on the ground at the place where the complaining witness testified the offenses were committed; fifth, the circumstance that appellants were permitted unattended to leave the room where they were being questioned regarding the offenses; sixth, the discovery, a few minutes after appellants had returned to the room where they were being examined, that the above-mentioned marks on the ground had been obliterated; seventh, the silence of appellants in the face of accusatory statements made in their presence.

No useful purpose will here be served by a statement of the legal principles relating to the character of evidence which will measure up to the statutory requirement that the testimony of an accomplice be corroborated. It is settled that such evidence need not be sufficient of itself to support a conviction; that it may be slight and standing alone entitled to little consideration. Such evidence must, however, tend to connect an accused with the commission of the offense with which he is charged. *People v. Kempley*, 205 Cal. 441, 456, 271 P. 478; *People v. Davis*, 210 Cal. 540, 549, 293 P. 32.

It is obvious that a reviewing court, in giving consideration to a contention of the character which is here advanced, must of necessity place itself in the position of a trier of facts. The task involves purely the fact trier's familiar prerogative of weighing the evidence.

Bearing in mind the above-mentioned legal principles which are applicable to the situation, we have no hesitancy in declaring that the evidence to which reference has above been made was sufficient to fulfill the requirement of section 1111 of the Penal Code. Possibly no isolated circumstance of those relied upon by respondent would be sufficient to comply with the statutory requirement. Taken together, it is our opinion that they are sufficient. We cannot refrain from mentioning particularly the significant silence of appellants in the face of statements directly accusing them of having committed offenses that were at least bestial and which were accompanied by voluntary brutality. *People v. Jensen*, 76 Cal. App. 558, 562, 244 P. 1086.

Appellants contend that the trial court's refusal to give a certain instruction offered by them and the giving of certain other instructions constitutes reversible error under the circumstances. The instruction which was offered and refused was as follows: "The jury is instructed that the witness, James

David Brown, is an accomplice." The witness, James David Brown, was the complainant in the action. It is urged that the evidence conclusively established that he was an accomplice in the commission of the offenses of which appellants were accused, and that therefore it was the trial court's duty to have given the instruction.

Appellants do not specify any particular instructions which were given by the trial court of which they complain, but make the general contention that it was error for the trial court to instruct the jury "that it was for them to determine whether or not the witness, James David Brown, was an accomplice." The contention of appellants with respect to the refusal and giving of instructions may therefore be stated generally as a complaint that, since the evidence established the character of the complainant as an accomplice, the trial court erred in advising the jury that the duty devolved upon that body to determine from the evidence whether or not he was an accomplice, but, on the contrary, the court should have told the jury, as appellants requested, that the complainant was an accomplice.

[3,4] Since we have heretofore indicated that, for the purposes of this opinion, we should assume that the complaining witness was an accomplice, it is necessary to give consideration to the last-mentioned contention of appellants, having in mind the presence of this assumption. Indulgence in the assumption necessarily produces the conviction that the court erred in refusing to instruct the jury that the witness was an accomplice and in leaving to that body for determination the question of whether or not the witness was an accomplice as this term is defined in section 1111 of the Penal Code. It does not, however, follow therefrom that the judgment must be reversed because of the error which we here assume the trial court committed.

An exactly similar situation was presented in the case of *People v. McDermott*, 75 Cal. App. 718, at page 720, 243 P. 485, in which it is said: "The jury should have been instructed that Sovia must be regarded as an accomplice. That question should not have been left to it to determine. However, it

must be presumed that the jurors observed and applied the instructions given them. In other instructions the definition of an accomplice was correctly stated, as also was the rule that the defendant may not be convicted on the uncorroborated testimony of an accomplice, and that the corroborating evidence is not sufficient if it merely shows the commission of the crime and the circumstances thereof; and further, that such corroborating evidence must tend to connect the defendant with the commission of the crime. Hence it is inconceivable that the erroneous instruction given in any way prejudiced any right of the appellant." The above-quoted language was expressly approved by the Supreme Court in the case of *People v. Ferlin*, 203 Cal. 587, 601, 265 P. 230, 237, where it was declared that the trial court's error "cannot be said to have prejudicially affected the defendant."

We have examined the various instructions given by the trial court in the instant case, and have found that in several of them the jury was given the correct definition of an accomplice and was informed that the testimony of an accomplice must be corroborated by evidence which should tend to show, not merely that the offenses charged in the information had been committed, but also the connection of appellants therewith. We encounter no difficulty therefore in declaring that, even though it be assumed, as we have here done, that the complaining witness was an accomplice and the trial court erred in refusing to instruct the jury that the witness was an accomplice, nevertheless the error cannot be said to have so prejudicially affected appellants as to necessitate a reversal of the judgment. We are entitled to indulge in the further assumption that the jury followed and properly applied the instructions which were given. Finally, an examination of the entire record herein entirely fails to produce the conviction that the trial court's error in misdirecting the jury has resulted in a miscarriage of justice. Article 6, § 4½, Constitution of California.

For the reasons stated, the judgment and order from which this appeal has been taken are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

5 Cal.App.2d 428

PENE v. MAUK.
Civ. 5268.

District Court of Appeal, Third District,
California.

March 21, 1935.

Rehearing Denied April 20, 1935.

1. Evidence ⇨594

Court in trial without jury may ignore uncontradicted testimony if inherently improbable, but not if nothing indicates its improbability or untruthfulness.

2. Appeal and error ⇨878(1)

Only errors reviewable are those urged by appellant for reversal, and errors committed against successful party will be disregarded.

3. Trial ⇨82

In action against executor based on testator's employment agreement with plaintiff and wife, objection to testimony of plaintiff's wife concerning conversation with testator because wife was disqualified under certain statute *held* too general, since disqualification paragraph of statute included several distinct classes (Code Civ. Proc. § 1880).

4. Appeal and error ⇨1175(1)

Where record showed that amount received by plaintiff, suing executor for accounting based on employment agreement, was incorrect, and that recalculation would be necessary to determine profits which testator agreed to share with plaintiff and his wife, appellate court could not grant appealing plaintiff's request to determine such amount and order judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Rene Pene against C. S. Mauk, special administrator of the estate of Bertrand Pene, deceased; such administrator having been substituted for William M. Morse, Jr., as executor of the will of the deceased. Judgment for defendant, and plaintiff appeals.

Reversed and remanded for a new trial.

Frank J. Barry and J. B. Joujon-Roche, both of Los Angeles, for appellant.

C. S. Mauk and C. S. Wagner, both of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant had judgment in an action begun by the plaintiff for an accounting of money alleged to be due and unpaid the plaintiff for and on account of a certain agreement

entered into between the plaintiff and his wife, with Bertrand Pene, deceased, whereby it was agreed that the plaintiff and his wife should give up their employment in the place where they were at work, and enter and begin work in a laundry belonging to Bertrand Pene, deceased, upon the condition that the plaintiff and his wife would share equally with Bertrand Pene in the profits realized from the conduct of the business; that is to say, the plaintiff and his wife together should receive one half of the profits, and Bertrand Pene and his wife the other half. From the judgment in favor of the respondent, the plaintiff appeals.

In pursuance of the agreement between Bertrand Pene and the plaintiff, the plaintiff and his wife gave up their employment, and on or about the 15th day of July, 1928, began working in the laundry owned by Bertrand Pene, and the plaintiff continued working therein until on or about April 29, 1931. It appears that Justine Pene, the wife of the plaintiff, after having worked in the laundry for a number of months gave birth to a child, after which time she ceased to work in the laundry; but the agreement that the plaintiff should receive one-half the profits was testified to as continued in force.

On or about the 29th day of April, 1931, Bertrand Pene died. Proceedings were had leading to the appointment of the respondent as the executor of the last will and testament of Bertrand Pene, deceased; notice of publication to creditors is alleged to have been given; and the plaintiff filed a claim for the amount alleged as the balance due for and on account of the agreement with the deceased, which claim was rejected by the executor. In connection with the filing of the claim the plaintiff requested an accounting, which was denied. The answer of the defendant denied the allegations of the plaintiff's complaint, which set forth the facts which we have herein stated, but did not deny the due execution and presentation of the claim against the executor of the estate.

The court found that the profits of the laundry, prior to the death of Bertrand Pene, were approximately \$1,000 a month. It also found as follows (in paragraph IV): "That it is not true that on or about the 7th day of July, 1928, or at any time thereafter, the said Bertrand Pene proposed that he would give plaintiff and said Justine Pene one-half of the profits of said laundry, and it is not true that the plaintiff and said Justine Pene orally accepted any such proposition."

The court also found, in paragraph VI, as follows: "The court finds that it is true that

the plaintiff and said Justine Pene receive various sums of money at various times from the said Bertrand Pene, in the aggregate sum of about \$7,000, but finds that such moneys were paid in compensation for said services."

While the record shows that the plaintiff and his wife went to work in the laundry belonging to Bertrand Pene, on or about the 15th day of July, 1928, the agreement between the parties was entered into on or about the 7th day of July, 1928. It will be noted that while the court found that the plaintiff and Justine Pene had been paid in the aggregate about \$7,000 as compensation for their services, there is no finding that the plaintiff and Justine Pene had been paid in full, from which it necessarily follows that if the testimony shows without contradiction, as will hereafter be mentioned, that the compensation to be received for their services was one-half the profits, and the profits are shown to be \$1,000 a month, as found by the court, then and in that case the point raised by the appellant that the findings are not sustained by the evidence is well taken. A mere calculation demonstrates conclusively that the plaintiff and his wife are entitled to further compensation based upon the promise of receiving one-half of the profits even though no partnership in the business is shown to have existed.

Bertrand Pene was the father of Rene Pene, and his business consisted in conducting a laundry. Rene Pene and his wife were engaged in laundry work for another employer. The testimony shows, without contradiction, that on or about the 7th day of July, 1928, Bertrand Pene visited Rene Pene, and his wife, and stated to the plaintiff and Justine Pene, the wife of the plaintiff, that if they would give up working where they were employed and come and work in the laundry owned by him, as compensation he would give them one-half of the profits, stating at the time what the profits of the business were. After some consideration the proposition made by Bertrand Pene was accepted by the plaintiff and his wife, who gave up work where they were employed and entered the laundry owned by Bertrand Pene, and continued work therein from the 15th day of July, 1928, until the death of Bertrand Pene on April 29, 1931, save and except that Justine Pene, after the birth of the child referred to, no longer worked in the laundry.

A number of witnesses were called by the plaintiff, all testifying as to the fact that the agreement between the parties was as we have set forth herein. Justine Pene testified as follows:

That Bertrand Pene called up on the telephone and wanted to speak to her and her husband; that Rene Pene, her husband, was absent at the time, but afterwards, on the 7th day of July, 1928, Bertrand Pene came to the house, picked her up, and drove her to the place where she was at work; that Bertrand Pene told her he was old, ill, and could not go on with the business any more, and the business was in the hands of strangers and he preferred to have someone of his family run the business. "He said he wanted my husband and myself to go to work with him, and if he made a dollar, we would get fifty cents of it; and I said, 'Well, I don't know.' I said, 'Rene and you have been together before and you could not get along; we are both working now and I don't like to change jobs; suppose we could not get along?' He said, 'This time we will get along; we will just give into each other.' I said: 'I don't know; we will have to think it over.' He said, 'I am going down to see Rene.' I said, 'I don't believe you will be able to see Rene because he is working.' He said, 'I know the foreman there and he will let me in, and I will go and see him.'" On the evening of the same day Bertrand Pene came to the house where the plaintiff and Justine Pene were living. "He asked us if we had decided what we were going to do. I said I didn't like the idea of living there, but maybe we might be able to go to work. And we decided to go to work.

"Q. What was said when you decided to go to work? What was said by either you or your husband? A. He says, 'Monday you notify your bosses that you are leaving.'

"Q. Who said that? A. Bertrand Pene. He said, 'Monday you notify your bosses you are leaving work on Thursday—that you are leaving work Wednesday evening, and Thursday morning we will leave for San Francisco.'

"Q. What did you say? A. I said all right.

"Q. What did your husband say, if anything? A. He said that was all right, too."

At the same time, Bertrand Pene, in referring to compensation, said that the plaintiff and his wife would receive one-half of the profits; if he made a dollar, they would get fifty cents. The record shows that after this conversation Bertrand Pene and the plaintiff and his wife made a trip to San Francisco.

August Ferran testified that he had a conversation with Bertrand Pene in which he said:

"We are going to run the place, and if we get one dollar we get fifty cents each.

"Q. Did you mention anybody else as being his partner? A. He meant his son; he said he didn't feel too well.

"Q. Please state what the old man said at that time? A. Well, the old man says, 'We are going to run the place together, and if we make one dollar, it will be fifty cents for each.'

"Q. Did he say who he meant by 'we'? A. His son, he meant his son."

This conversation took place at Redwood City, where Bertrand Pene and the plaintiff and his wife stopped on their visit to San Francisco which we have just mentioned.

Mrs. Clemence Ferran testified that she was present at the conversation; that Bertrand Pene said he was going to take his son and daughter-in-law with him in business and give them, "if he made a dollar, give them fifty cents, give them half; that is the way he said he was doing; he was going to take the son and daughter-in-law in business with him and give them one-half."

The witness J. B. Castillo testified that he met Bertrand Pene in the early part of July at the Wardrobe Laundry where the plaintiff was employed; that at that time he had this conversation with Bertrand Pene: "Rene and I was standing there at my desk where I was working, talking, when he came in and Rene introduced me to him. The first thing he (Bertrand Pene) said, was: 'What do you think of my boy? I want him to come back and work with me; I will give him a half interest in the business and a ten-day vacation for him, myself and his wife.' Rene had some other work to do in the back, and Mr. Pene followed him out there."

The witness Bruchie testified as follows:

"He (referring to Bertrand Pene), said, 'Come down and go to work for me.' I was driving for another laundry and I didn't want to quit my job.

"Q. Who was present at that time? A. Rene Pene. And he told me I didn't have to be afraid because I would be working for my brother-in-law and my sister.

"Q. Who is your brother-in-law and your sister? A. Mr. Rene Pene and Mrs. Justine Pene.

"Q. What relation is Justine Pene to you? A. She is my sister."

During the trip it appears that the plaintiff, his wife, and Bertrand Pene stopped at the home of a Mr. Verdier in San Jose, where practically the same statement was made in relation to the plaintiff and his wife entering the laundry belonging to Bertrand Pene. To the same effect was the testimony of Mr. and

Mrs. Bersinger, at whose home the parties stopped on the trip referred to. At this home Bertrand Pene stated that he had been in business for twenty-five years and his son was entering the business to help him out.

The testimony in the record shows that after the plaintiff and his wife began work in the laundry owned by Bertrand Pene, Bertrand Pene and plaintiff and his wife drew from the business the same sums of money. At first \$65 a week was drawn from the business by Bertrand Pene, and \$65 a week drawn in favor of the plaintiff and his wife. Later on, \$75 a week was drawn by the respective parties. Still later on, \$100 a week was drawn by the respective parties, the plaintiff and his wife together receiving at all times the same sum that was drawn from the business by Bertrand Pene.

The testimony which we have summarized stands in the record without any substantial contradiction whatever; we might add, without *any* contradiction. All that is called to our attention is the fact that in making up an income tax return, there appears in one corner of a copy thereof a notation as to salary paid the plaintiff. Who made this notation, or why it was made, is not explained. The purpose, however, is quite apparent—a reduction in the tax due the government. The pay roll of the laundry, however, does not include the names of either Rene Pene or Justine Pene, which negatives whatever weight might be given to the notation on the copy of the income tax return.

[1] Where the testimony is inherently improbable, the court is under no obligation to accept the same, although uncontradicted; but where the testimony is not such, where there is nothing to indicate its improbability or the untruthfulness thereof, the rule is well settled that uncontradicted testimony cannot be ignored.

In the case of *Michaels v. Pacific Soft Water Laundry*, 104 Cal. App. 366, 286 P. 172, 173, appears a statement of the rule which we think applicable here: "Upon the evidence before it the trial court should have made a finding favorable to the bank upon this issue. The general rule is that the testimony of a witness cannot be wholly disregarded, but that unless it is impeached or contradicted by other testimony, by some presumption, or by an inference deducible from the facts proved, or unless it is inherently improbable, the trial court must accept it as true. 10 Cal. Jur. 1143; *Stewart v. Silva*, 192 Cal. 405, 410, concurring opinion, 221 P. 191; *Sun-Maid Raisin Growers v. Papazian*, 74 Cal.

App. 231, 239, 240 P. 47." Other cases might be cited, but the foregoing we deem sufficient.

[2] In support of the judgment of the trial court the respondent urges, first, that the testimony of Justine Pene was inadmissible. At the time of the trial the respondent made the following objection thereto: The witness Justine Pene being asked to relate the conversation had with Bertrand Pene, counsel for respondent made the following objection: "I object to the question and move the answer be stricken out on the ground that this witness is disqualified under the provisions of section 1880 of the Code of Civil Procedure." The rule is well settled that upon appeal only such errors will be reviewed as are urged by the appellant as grounds for reversal. Errors committed against a successful party will not be noticed upon appeal. 2 Cal. Jur. p. 839; Seaward v. Malotte, 15 Cal. 304; Estate of Olmsted, 122 Cal. 224, 54 P. 745; Coyle v. Lamb, 123 Cal. 264, 55 P. 901; Rapp v. Southern Service Co., 116 Cal. App. 699, 4 P.(2d) 195.

[3] We may add that the objection interposed by the respondent is too general. As said in Martin v. Travers, 12 Cal. 243: "The objection fails to specify the point upon which it rests, and did not merit consideration for its generality. * * * To have entitled it to notice, the party should have laid, as the authorities say, his finger on the point at the time." (Citing a number of cases.)

The disqualification paragraph of section 1880 of the Code of Civil Procedure includes several distinct classes. By reason of the fact that the respondent is not in a position to raise the question, we need not consider whether the adoption of section 161a of the Civil Code (St. 1927, p. 484) alters the rule relative to the testimony of a wife where her husband is a plaintiff, permitting such testimony as set forth in the case of Badover v. Guaranty Trust & Savings Bank, 186 Cal. 775, 200 P. 638.

The pleadings not having raised the question as to the due execution and presentation of a claim against the estate of Bertrand Pene by the plaintiff, the argument of the respondent to the effect that the claim as presented was insufficient need not be considered.

[4] By reason of the fact that an inspection of the record shows that the amount received by the plaintiff, as found by the court, is incorrect, and also that a recalculation would be necessary to determine the amount of profits, the appellant's request that this court de-

termine the same and order judgment in behalf of the plaintiff cannot be allowed.

The findings of the court being directly contrary to the uncontradicted testimony set forth in the record showing the relationship of the plaintiff with Bertrand Pene, and the contract entered into between them as to how compensation should be determined, it follows that the judgment must be reversed, and it is so ordered, and the cause remanded for a new trial.

We concur: PULLEN, P. J.; THOMPSON, J.



5 Cal.App.2d 366

**COLLINS v. HODGSON et al., and three
other cases.**
Civ. 5185-5188.

District Court of Appeal, Third District,
California.

March 19, 1935.

1. Appeal and error ⇨977(3)

Granting of new trial rests so largely in trial court's discretion that court's action will not be disturbed except for manifest and unmistakable abuse of discretion.

2. Appeal and error ⇨977(3)

Stronger showing is required to justify interference with order granting, than one refusing, new trial.

3. Automobiles ⇨246(11)

In automobile collision actions, instruction that driver's knowledge that preceding vehicle was slowing down or changing its course was as binding as if signal required by Motor Vehicle Act were given *held* error (St. 1925, p. 413, § 130 (a)).

4. Trial ⇨191(7)

In automobile collision actions, instruction that driver of plaintiffs' automobile was negligent if, after degree of knowledge which was as effective as if signal required of preceding driver had been given, he had time and space within which to act and failed to get his automobile under control, *held* erroneous as assuming that driver had such knowledge (St. 1925, p. 413, § 130 (a)).

5. Automobiles ⇨246(26)

In automobile collision actions, instruction that driver of plaintiffs' automobile was negligent if he had time and space in which to

act and failed to heed warning and neglected to get his automobile under control *held* erroneous as incorrect statement of degree of care required, which was governed by care of ordinary prudent man.

6. Automobiles ⇨246(26)

In automobile collision actions, instruction that, if driver of plaintiffs' automobile had time and space within which to act and failed to heed warning, such conduct was negligence, where driver did act, *held* ambiguous, as warranting inference that jury were directed to find driver guilty of contributory negligence where collision occurred notwithstanding his action.

7. Automobiles ⇨246(26)

Instruction that driver is negligent if, on observing an automobile ahead slowing down or changing its course, he fails to get his automobile under control as required by law, and collision is proximate result, *held* error as omitting reference to ordinary care and essential elements of conditions, time and space surrounding collision, and driver's right to assume that preceding motorist would first see that his movement could be made in safety and give warning required by statute (St. 1925, p. 413, § 130 (a)).

8. Automobiles ⇨243(4)

In actions by motorists colliding with automobile ahead, defendant's testimony, after stating that he had no recollection of holding his hand out as warning, that it was second nature for him to stick his hand out when he was going to stop, *held* improper (St. 1925, p. 413, § 130 (a)).

9. Pleading ⇨365(2)

Where no reason was assigned for motion to strike objectionable portion of answer, refusal to strike objectionable portion which was repeated following answer, where grounds of motion were correctly specified, *held* error.

Appeal from Superior Court, Yolo County; Neal Chalmers, Judge.

Separate actions by Grace E. Collins, by John A. Collins, by Alice Simonton, and by George Simonton, against I. D. Hodgson and another. Judgments for defendants, and, from orders granting a new trial, defendants appeal.

Affirmed.

Inman & West, of Sacramento, and A. G. Bailey, of Woodland, for appellants.

Ingemar E. Hoberg, of San Francisco, and Murle E. Shreck, of Sacramento, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action was brought against defendants for injuries sustained in a collision between two automobiles. The jury returned a verdict in favor of defendants, and a judgment was entered accordingly. Thereafter, upon a motion for a new trial, the same was granted upon grounds other than the insufficiency of the evidence to justify the verdict. It is from these orders granting a new trial that defendants appeal.

On the morning of the accident, plaintiffs herein, Mr. and Mrs. Collins and Dr. and Mrs. Simonton, were proceeding westerly along the state highway in the county of Yolo, in the automobile of Mr. Collins, which was being operated by Dr. Simonton. For some distance plaintiffs had been traveling about 50 feet in the rear of a car owned by defendant I. D. Hodgson and driven by defendant C. E. Hodgson. When the cars had reached a point approximately 2 miles west of Sacramento, defendant stopped, and the car of plaintiff struck the rear left corner of defendants' car, causing plaintiffs' car to swerve across the highway to the left, and, after traveling approximately 65 feet, struck a tree at the side of the road, causing the injuries of which complaint is here made.

It is the contention of plaintiffs that defendant stopped suddenly in the middle of the right side of the road, which at that point was a two-lane highway, so indicated by a white line down the center. Plaintiffs were traveling about 50 feet behind defendant, and saw no signal of defendant's intention to stop, and it was not testified by defendant that he gave any signal that he was intending to stop or change his course. Plaintiffs admitted that they saw defendants' car begin to slacken speed when they were approximately 50 feet away. Defendant claims he was in the act of driving off the highway and had not stopped when struck by plaintiffs. A traffic officer testified that, according to measurements of the tracks taken by him, the collision occurred 18 inches from the right or north edge of the highway.

[1] As to the granting of a new trial, it is said: "That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse, has become axiomatic, and requires no citation of authority in its support. It is true that such discretion is not a right to the

exertion of the mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules, to the accomplishment of justice. But, so long as a case made presents an instance showing a reasonable, or even fairly debatable, justification under the law for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action." *Harrison v. Sutter Street Railway Co.*, 116 Cal. 156, 47 P. 1019, 1020.

[2] Furthermore, a stronger showing is required to justify interference with an order granting than one refusing a new trial. We therefore undertake the examination of the questions here presented with these general rules in mind.

The principal objections urged upon the motion for a new trial were as to certain instructions and errors alleged to have been committed in the admission of certain evidence.

The first instruction criticized, No. 28, proposed by defendant and given by the court, reads:

"When a person by his own observation has knowledge that a vehicle driven and operated by another is slowing down, changing its course or stopping, this knowledge is just as binding and effective on such person as if the operator of the vehicle ahead had given the hand signals required by the California Vehicle Act. No man has a right to shut his eyes as to what is to be seen. It is a part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collisions with other vehicles using the highway. He must be vigilant at all times and must anticipate and expect that other drivers will complete what they evidently began to do and of which the operator has knowledge from his own observation.

"Therefore, if you find that George Simonton after such knowledge on his part had the time and space within which to act and failed and neglected to heed such warning and failed and neglected to get his own vehicle, or the vehicle which he was driving under control then such conduct on the part of George Simonton was negligence and if such negligence was the sole cause of the collision or proximately contributed thereto, then neither the said George Simonton nor his wife, Alice Simonton can recover any damages from the defendant.

"You are further instructed that under the above circumstances, if the owner of the car, John A. Collins, was riding therein, and that the operator of the car, George Simonton, was driving the said car with the permission, express or implied, of the owner then the negligence of the operator is imputed to the owner and neither the owner John A. Collins, or his wife, Grace M. Collins, can recover from the defendants and your verdict will be for the defendants. (*Meyers v. Bradford*, 54 Cal. App. 157, 201 P. 471; *Graybiel v. Auger*, 64 Cal. App. 679, 222 P. 635-639.)"

This instruction requires a reference to the California Vehicle Act; that portion thereof being material here reading as follows: "Sec. 130 (a) The driver of any vehicle upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it can not be made in safety, shall wait until it can be made in safety; then, if the operation of any other vehicle may reasonably be affected by such movement, the driver shall give a signal plainly visible to the driver of such other vehicle of the intention to make such movement. * * *" St. 1923, p. 558, as amended by St. 1925, p. 413.

[3] We believe the instruction as given was ambiguous and misleading. The purport of the instruction seems to be that, when a person observes that a vehicle is slowing down or changing its course, this knowledge is just as binding and effective as if the signal required by the act were given. This is not in accordance with the section, which requires that, before the act is done, the driver shall see that such movement can be made with safety and shall then give the required signal of his intention so to do, thereby giving to the operator of the car to the rear time to meet the changed conditions. It is admitted plaintiff saw the forward car slowing down, but to hold that is as binding and effective as a prior signal has the effect of nullifying the failure of his right to rely upon the provision of the act that a warning in advance of stopping would be given.

In the case of *Olsen v. J. J. Jacobs Motor Co.*, 99 Cal. App. 423, 278 P. 1051, 1055, it was held: "Up until this moment of time we think the plaintiff by his testimony showed that he had a right to assume that the driver of the Motor Company's car would observe the law"; and also in *Moreno v. Los Angeles Transfer Co.*, 44 Cal. App. 551, 186 P. 800, 802: "Contributory negligence cannot be predicated upon an omission to assume that another will violate the law." *Medlin v. Spazier*, 23

Cal. App. 242, 137 P. 1078; Raymond v. Hill, 168 Cal. 473, 143 P. 743.

[4] The instruction also is open to criticism, in that it assumes that the driver of the car had "such knowledge," that is, that degree of knowledge which was as effective as if the signal required by law had been given, which is an assumption of a fact that was solely within the province of the jury.

[5, 6] Another criticism directed to the instruction is that it states that, if the driver had the time and space within which to act, and failed and neglected to heed such warning, and neglected to get his own vehicle under control, he was negligent. This does not correctly state the degree of care required. It is the care of an ordinary prudent man, and not the care of a particular individual, that governs the question of negligence. Attention is also directed to the instruction, in that it states that, if Simonton, after such knowledge on his part, had the time and space within which to act and failed to heed such warning, such conduct was negligence. This is ambiguous and unintelligible, as it is apparent that he did act, and therefore, having acted, and the collision having occurred notwithstanding his action, the jury may have inferred that they were directed to, and therefore did, find him guilty of contributory negligence.

Complaint is also made of instruction No. 35, submitted by defendant and given by the court, which reads as follows:

"You are instructed, that the statute requiring the driver of a vehicle upon the public highways of this state upon stopping or turning or changing its course to make hand signs, is for the warning of those who may be affected by the movements of the driver of the automobile.

"However, if an operator of an automobile, is following another car, observes that the car ahead is slowing down and changing its course, the operator of the following car must take the same precautions to get his car under control as if a hand sign had been given by the operator of the leading car. If upon observing a car slowing down and changing its course, the driver of the car behind fails to get his car under control, as required by law and a collision is the proximate result of the driver's failure to control his car then the driver of the car behind is guilty of negligence which will prevent him from recovering anything from the defendant."

[7] The vice of this instruction lies in the fact that it also omits any reference to ordi-

nary care, and the essential elements of conditions, time and space surrounding the collision, and the right of plaintiff to assume, until the same reasonably appeared, that the defendant would first see that the movement could be made in safety, and give the warning required by section 130 (a) of the California Vehicle Act. The instruction required further that the driver of the car to the rear, upon observing the car ahead to be slowing down or changing its course, to get his car under control as required by law. That, too, goes beyond the requirement of the act. The law does not require, regardless of circumstances, that the car shall always be under the same degree of absolute control. One degree of control might be exacted of a driver in the daytime upon a straight way unobstructed by other vehicles and another degree of care exacted of one driving in heavy traffic or at night and in imminent danger of collision. The test of negligence, therefore, is not to be measured irrespective of circumstances, but has to do with the surrounding conditions and the exercise of ordinary care. If plaintiffs exercised ordinary care, but the negligence of defendant deprived plaintiffs of control over their car, they are thereby not barred from recovering.

Other instructions are cited and criticized for various reasons. We do not believe that it is necessary to discuss them further, sufficient having been said to show that the trial court was justified in the granting of a new trial, and undoubtedly upon the next trial, by reason of the study and criticism of those questioned instructions not here considered, the same errors and ambiguities will not again appear.

[8, 9] Objection also is made to a certain question and answer of defendant, as follows: "Mr. Hoberg. Just immediately prior to that time, you have no recollection of holding any hand out to warn anybody behind, have you? A. No, I don't know whether I did, or I did not. *It is second to nature with me to stick my hand out when I am going to stop.*" That portion of the answer italicized was improper, although no reason was assigned for the motion to strike. However, neither court nor counsel seemed to have waited for a statement of the reason; they undoubtedly assuming that counsel had in mind the proper grounds, as undoubtedly had all the parties concerned. The objectionable portion of the answer was repeated, however, in the following answer, to which a motion to strike was made, the grounds then correctly specified. The ruling of the court denying this latter

motion was erroneous, and, in view of the answer, the trial court may well have assumed that it was prejudicial to the rights of plaintiffs.

Inasmuch, therefore, as the erroneous instructions were given and the orders granting a new trial were clearly not an abuse of discretion, and no legitimate complaint of the exercise of this right by the trial court can be made, it is the order of this court that the orders appealed from be affirmed.

We concur: **PLUMMER, J.; THOMPSON, J.**



5 Cal.App.2d 282

SAMPSON v. BOYSEN.

Civ. 1185.

District Court of Appeal, Fourth District,
California.

March 15, 1935.

Appeal and error ⇨800

Motion to dismiss appeal for failure to timely institute proceeding for preparation of bill of exceptions or transcript would be denied where statutory provisions were complied with and clerk's transcript was filed before time set for hearing of motion (Code Civ. Proc., §§ 950, 953).

Appeal from Superior Court, San Diego County; **L. N. Turrentine**, Judge.

Action by **Robert K. Sampson**, trustee in bankruptcy for the estate of **Marvin A. Berg**, a bankrupt, against **S. I. Boysen**. From an adverse judgment, defendant appeals. On motion to dismiss appeal.

Motion denied.

Ed. P. Sample and **Wm. H. Wylie**, both of San Diego, for appellant.

Seymour W. Wurfel and **Charles B. De Long**, both of San Diego, for respondent.

BARNARD, Presiding Justice.

The respondent has moved to dismiss this appeal on the ground that no proceeding for the preparation of a bill of exceptions or of a transcript is pending in the trial court; that the time to institute any such proceeding has expired; that no request for the preparation of a clerk's transcript has been filed; and

that the time within which the preparation of a clerk's transcript might be requested has expired.

Notice of this motion was filed in this court on February 8, 1935, the motion being noticed for March 12, 1935. On February 21, 1935, a clerk's transcript on appeal was filed here. The Code sections and cases cited by the respondent in support of the motion all relate to the preparation of a bill of exceptions or of a reporter's transcript prepared under the alternative method. No authorities are cited relating to an appeal upon a clerk's transcript alone. The provisions of sections 950 and 953 of the Code of Civil Procedure have been complied with and the transcript was filed long before the time set for hearing of the motion. Upon the authority of *Snodgrass v. Hand*, 125 Cal. App. 265, 13 P.(2d) 769, and the cases therein cited, the motion to dismiss is denied.

We concur: **MARKS, J.; JENNINGS, J.**



5 Cal.App.2d 409

FUCHS et al. v. SOUTHERN PAC. CO. et al.

Civ. 9544.

District Court of Appeal, First District,
Division 2, California.

March 21, 1935.

1. Appeal and error ⇨607(1)

Where what purported to be clerk's transcript and what might be treated as reporter's transcript in lieu of bill of exceptions were not certified by trial judge, clerk, or reporter, reviewing court could not consider appeal as taken under statute providing for appeals by notice in lieu of bill of exceptions (Code Civ. Proc. § 953a).

2. Appeal and error ⇨927(7)

Where purported bill of exceptions failed to specify particulars wherein evidence was alleged to be insufficient, reviewing court must assume that evidence was sufficient to justify directed verdict, notwithstanding respondents' stipulation to correctness of transcript (Code Civ. Proc. § 648).

3. Trial ⇨59(2)

Refusal to permit plaintiffs to call adverse witness until their other witnesses had been examined, in adherence to generally adopted practice, held not error in view of

statute declaring that order of proof must be regulated by court's sound discretion (Code Civ. Proc. §§ 2042, 2055).

4. Appeal and error ⇐1032(2)

Plaintiffs could not complain of refusal to permit them to call adverse witness until their other witnesses had been examined, in absence of showing of prejudice (Code Civ. Proc. §§ 2042, 2055).

5. Appeal and error ⇐882(14)

Plaintiffs could not complain of direction of verdict for defendants after denial of motion for nonsuit, where plaintiffs opposed motion for nonsuit.

6. Trial ⇐173

Denial of nonsuit did not prevent court from subsequently directing verdict for defendants.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Ida Fuchs and another against the Southern Pacific Company and others. From a judgment for defendants, on directed verdict, plaintiffs appeal.

Affirmed.

Phillips & Munck, and Felton L. Watson, all of Oakland, for appellants.

Elliott Johnson, of Oakland, for respondents.

NOURSE, Presiding Justice.

This is an action for damages arising out of the death of Dominick Fuchs, which resulted from a collision between a train operated by the defendant corporation and a motor vehicle operated by the deceased. The plaintiffs are the surviving wife and son of the deceased. The collision occurred while the deceased was attempting to cross the main line tracks of the defendant corporation at the intersection of Adeline and Sixty-Second streets in the city of Berkeley. At the time of the collision the pavement was dry and the atmosphere was clear. The train was running at an ordinary rate of speed not in excess of any local regulations and was sounding ample warning by whistle and bell with headlight plainly showing. Those witnesses who saw the collision testified that the train was plainly visible; that these warnings were heard long before the collision; and that the deceased did not stop to look for an approaching train before entering upon the tracks. It was also shown that the deceased had been over the tracks at this intersection on numer-

ous occasions and was thoroughly familiar with it.

At the conclusion of plaintiffs' case the defendants made a motion for a nonsuit which was denied. The defendants then rested and made a motion for a directed verdict upon the ground that the evidence failed to show any negligence on the part of defendants and upon the ground that the evidence affirmatively showed contributory negligence on the part of the deceased. This motion was granted and the plaintiffs appeal from the judgment on the verdict.

[1, 2] A preliminary view of the record is necessary. Appellants state that they are appealing upon a bill of exceptions and a typewritten copy of what purports to be such a bill is included in the transcript. This does not meet the requirements of rule VII of the Rules for the Supreme Court and District Courts of Appeal that transcripts in civil cases not coming under section 953a of the Code of Civil Procedure shall be printed. It contains a typewritten statement that the trial judge settled and allowed the bill of exceptions, but it does not appear that the bill was thereupon engrossed or that it was thereafter certified by the trial judge as required by section 650 of the Code of Civil Procedure. What purports to be the clerk's transcript and what might be treated as the reporter's transcript in lieu of the bill of exceptions both fail to meet the requirements of section 953a of the Code of Civil Procedure because not certified by the trial judge, the clerk nor the reporter. We are therefore not permitted to consider the appeal as taken under section 953a, but must go back to the provisions of sections 648 to 650. If respondents' stipulation to the correctness of the transcript waives the infirmities heretofore noted, we are nevertheless bound by the express provisions of section 648 that when the exception is to the verdict or the decision upon the grounds of the insufficiency of the evidence to justify it, the objection must specify the particulars in which the evidence is alleged to be insufficient. This purported bill of exceptions contains no such specifications, and we must assume, therefore, that the evidence was sufficient to justify the directed verdict for the failure to show negligence on the part of the defendant or on the ground of the contributory negligence of the deceased.

[3, 4] The first assignment of error made in the bill is that the trial court erred in refusing to permit the plaintiffs to call an adverse witness under section 2055 of the Code of

Civil Procedure until their other witnesses had been examined. The trial court merely followed a practice which has been generally adopted and which finds support in the provisions of section 2042 of the Code of Civil Procedure, which declares that the order of proof must be regulated by the sound discretion of the court. The appellants have not shown that they were prejudiced in any manner through the order complained of.

[5, 6] The second assignment is that the trial court erred in directing a verdict against the plaintiffs "after having denied the defendants' motion for nonsuit." No authorities are cited to show error in this respect. The argument is that if the motion for nonsuit had been granted the appellants would have had the right to bring the cause to trial again and to support it with additional evidence, whereas because of the directed verdict, the litigation is closed. But the plaintiffs opposed the motion for a nonsuit and cannot now complain that it was not granted. Furthermore the settled rule is that the fact that a motion for a nonsuit has been denied does not prevent the court from subsequently directing a verdict for the defendants. 24 Cal. Jur. 916. We find no error in the record as presented.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



5 Cal.App.2d 95

BATES et al. v. DALEY'S, Inc., et al.
Civ. 9018.

District Court of Appeal, Second District,
Division 2, California.

March 4, 1935.

Rehearing Denied April 3, 1935.

1. Appeal and error ⚡854(3)

If order sustaining demurrer is good on any ground as to all causes of action stated, judgment following will not be disturbed.

2. Frauds, statute of ⚡150(2)

Complaint against successor to corporation agreeing to redeem preferred stock, which failed to allege that successor's agreement to pay predecessor's obligations was written, held subject to general demurrer,

since it would be presumed that such agreement was oral and invalid as agreement to answer for another's debts in view of statute requiring plaintiff to plead fact that he relied on written instrument (Civ. Code, § 1624; Code Civ. Proc. §§ 447, 448, as amended by St. 1929, p. 851, §§ 1, 2).

3. Pleading ⚡32

Written contract which is foundation of cause of action may be pleaded in *hæc verba* rather than according to its legal effect, either by setting forth copy in body of pleading, or by attaching copy as exhibit and incorporating it by reference.

4. Pleading ⚡32

To justify pleading written contract in *hæc verba*, instrument thus made part of complaint must show on its face in direct terms, and not by implication, all facts which pleader would have to allege in pleading according to legal effect, and if instrument is not free from ambiguity, some definite construction must be put thereon by averment or pleading will be demurrable.

5. Corporations ⚡82

Counts of complaint on agreement to redeem preferred stock of corporation held not subject to special demurrer on ground of ambiguity whether alleged promise to redeem was contained in certificate or was collateral promise, where allegations did not purport to relate to collateral agreement, but were inserted to cure ambiguity in certificate as pleaded in *hæc verba* and to present issuable facts (Code Civ. Proc. §§ 1856, 1860).

6. Corporations ⚡312(3)

Term "capital stock" within statute forbidding directors to divide, withdraw, or pay to stockholders any part of capital stock, includes not only shares of which nominal capital is composed, but actual capital or assets with which corporation carries on its corporate business (Civ. Code, § 309).

[Ed. Note.—For other definitions of "Capital Stock," see Words & Phrases.]

7. Corporations ⚡376

Corporations may not purchase their own stock (Civ. Code, § 309).

8. Corporations ⚡82

Contract to repurchase stock on certain conditions is not illegal, or a fraud on other subscribers and creditors of corporation, where it is not shown that any fraudulent invasion of rights of stockholders or creditors has been attempted or would result (Civ. Code, § 309).

9. Corporations ⚡82

Complaint on agreement of corporation to repurchase its own stock, containing no allegation as to status of corporate assets or as

to existence of surplus profits exceeding corporate debts from which redemption price could be paid without injury to any creditor or stockholder, *held* subject to general demurrer (Civ. Code, § 309).

10. Corporations ⇨82

Counts of complaint on agreement of corporation to redeem preferred stock, which were not in form of common counts for money had and received, but were ordinary complaints in form prescribed by Code, and were founded on allegation that defendants agreed to repay such sums, *held* not common counts and generally demurrable (Code Civ. Proc. § 426).

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge.

Action by Ruth B. Bates and another against Daley's, Incorporated, and another. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Schweitzer & Hutton, of Los Angeles (Edward H. Gaylord, of Los Angeles, of counsel), for appellants.

Clive Johnson and Gibson, Dunn & Crutcher, all of Los Angeles (A. E. Pennekamp, of Los Angeles, of counsel), for respondents.

WILLIS, Justice pro tem.

This is an appeal by plaintiffs from a judgment entered upon failure of plaintiffs to further amend after demurrers to their amended complaint were sustained with leave to amend.

Plaintiffs, under the liberal provisions of section 378 of the Code of Civil Procedure as amended in 1927 (St. 1927, p. 631) joined as plaintiffs in this action and each separately cast her complaint in two separate counts or causes of action. For the purpose of this decision the two sets of causes may be deemed identical in form and substance, and but one set need be considered. The first and third causes allege that each defendant is a corporation authorized to transact business in California; that plaintiff is the holder of a stated number of shares of the preferred stock of Daley's, Inc., represented by a numbered certificate and of a specified par value; that for a valuable consideration said certificate was issued and sold to plaintiff in accordance with the permit of the corporation commissioner of the state of California, a true copy of said certificate being attached to the complaint, marked Exhibit A and made a part thereof; "that at the time of said pur-

chase of said certificate by said plaintiff, said defendant Daley's, Incorporated, agreed and promised to redeem or pay on December 31, 1931, to said plaintiff the sum of Twenty-five Dollars (\$25.00) for each share of preferred stock so sold as aforesaid"; that plaintiff has demanded payment of said sum and has tendered said certificate, but that defendants have failed and refused to pay the same or any part thereof; "that the promises on the part of said defendant to repay to said plaintiff the par value of said stock so issued to her as aforesaid was a material and controlling inducement to said plaintiff in the purchase of said stock, and plaintiff, except for said promises, would not have purchased said stock or any part thereof"; that defendant Continental Chain Stores, Inc., purchased all the assets of defendant Daley's, Inc., and assumed and agreed to pay all obligations of defendant Daley's, Inc., but has wholly failed and refused to pay plaintiff's demand, although demand was made upon both said defendants.

The second and fourth causes repeat the allegations of the first cause respecting the corporate character of defendants and the allegations last above recited respecting the Continental Chain Stores, Inc., and then allege "that in the same transaction and/or series of transactions in the sale of preferred stock of defendant Daley's, Incorporated, said defendant received within the last year from date hereof, for the use and benefit of said plaintiff, the sum of" \$3,000 in the case of Bates and \$3,400 in the case of Warner; "that both of said defendants agreed to repay said sum, but have wholly failed and refused so to do or to repay any part thereof, and each and all of said sums are now due, owing and wholly unpaid to this plaintiff." Exhibit A, which is made a part of the complaint, purports to be a certificate for 120 shares of preferred capital stock, par value \$25, issued January 16, 1929, by Daley's, Inc., to plaintiff Bates, it being alleged that one in the same form for 136 shares was issued to plaintiff Warner. It certifies that 6,000 shares of the company capital stock shall be known as 8 per cent. preferred stock, 34,000 shares as 8 per cent. preferred stock—series A, and 40,000 shares as 7 per cent. preferred stock—series A. As to the 6,000 shares of 8 per cent. preferred stock, the following appears in the certificate: "Said preferred stock shall be redeemable at par on December 31, 1931, provided the corporation has the option of redeeming the preferred stock, in whole or in part, at any time and from time

to time, after 30 days' written notice by mail * * * at 105% of the par value thereof. * * * All rights of holders of the preferred stock called for redemption will cease upon the date fixed therefor, except the amount due upon redemption, without interest." As to the 34,000 8 per cent. preferred stock—series A, the certificate provides as follows: "The corporation has the option of redeeming the 8% preferred stock—Series A, in whole or in part, at any time and from time to time, after 90 days' written notice." The same provision is attached to the 40,000 7 per cent. preferred stock—series A. Finally, it is provided that no preference is granted nor any distinction made between the preferred stock of either of these series and the common stock, as to voting power or liability of the holders to creditors of the corporation.

To this amended complaint defendant Continental Chain Stores, Inc., filed a separate demurrer on the general ground as to each of the causes of action stated and on special grounds as to the first and third causes of action. The special demurrer alleged uncertainty and ambiguity in that it could not be ascertained from the allegations of the complaint above quoted whether the promise to redeem or pay the certificate of stock was contained within the said certificate or was a promise collateral to said certificate; and in that it could not be ascertained from the allegations relating thereto whether the promise of Continental Chain Stores, Inc., to pay the indebtedness of Daley's, Inc., was or was not in writing. In a separate demurrer, entitled "Demurrer of Continental Stores, Ltd., formerly Daley's, Incorporated," and reciting, "Now comes Continental Stores, Ltd., formerly known as Daley's, Incorporated, and demurs," the amended complaint is attacked as to all four causes of action, on the general ground, and as to the first and third causes on the special grounds of uncertainty and ambiguity in that it could not be ascertained from the allegations above quoted whether the promise to redeem or pay the certificate was contained in the said certificate or was collateral to said certificate. This demurrer was apparently recognized by the trial court as the demurrer of Daley's, Inc., one of the defendants, and we are content to consider it as such, no point being raised herein to the contrary.

[1] The order sustaining both demurrers is general, with leave to amend, and under the well-known rule, if the order sustaining either separate demurrer is good on any ground as to all the causes of action stated, the judgment following will not be disturbed

2 Cal. Jur. 811; *People v. Central Pacific R. Co.*, 76 Cal. 29, 43, 18 P. 90. With this rule in view we will first consider the separate demurrer of Continental Stores, Inc., wherein all causes of action are attacked on the general ground and the first and third causes on the special ground that it could not be ascertained from the allegations thereof whether the promise of this defendant to pay the indebtedness of Daley's, Inc., was in writing or not.

[2] Prior to the amendment of sections 447 and 448 of the Code of Civil Procedure in 1929 (St. 1929, p. 851, §§ 1, 2), it was the rule that where an agreement or contract was pleaded as the basis of a right or obligation on which the complaint or defense was founded, but it was not stated therein whether the agreement was in writing or was oral, it was presumed, as against demurrer, that the agreement was in writing. In 1929 there was added to section 447 the words "if the plaintiff relies upon a written instrument, in whole or in part, that fact shall be pleaded." This provision was in force when this action was commenced, being stricken from the section in 1933 (St. 1933 p. 2548). This amendment had the effect of reversing the former presumption. If after the section was amended the plaintiff failed to plead the fact that he relied on a written instrument as a basis of contract obligations in his cause of action, it was presumed that the contract was oral. The purpose of the amendment is clear. It was to compel exposure of the fact as to whether the agreement relied on as basis of relief was in writing or not, to the end that legal issues might be raised by demurrer where the statute of limitations or the statute of frauds and such like might be pleaded, rather than compelling a defendant to wait and plead the same in his answer or to object to offer of proof at the trial. By section 1624 of the Civil Code it is provided that contracts to answer for the debt of another are invalid unless in writing subscribed by the party to be charged or his agent. In each cause of action herein plaintiffs allege that defendant Continental Chain Stores, Inc., agreed to pay all obligations of Daley's, Inc. Under section 447 as it then stood, for the purpose of considering the pleading on demurrer, it must be presumed that such agreement was not in writing and was therefore invalid and unenforceable. This defect was reached by the general demurrer and was fatal to all four causes in so far as Continental Chain Stores, Inc., was concerned. The special demurrer did not properly reach it because there was no uncertainty or ambig-

ulty in the allegation in the face of the presumption that the agreement was oral. It therefore must be held that the general demurrer of this defendant was well taken and properly sustained as to all four causes of action.

The separate demurrer of Daley's, Inc., attacks all four causes on the general ground, and the first and third on the special ground of uncertainty and ambiguity in respect to whether the alleged promise to redeem and pay the certificate was contained in the certificate or was a collateral promise. We will take up the special demurrer first.

[3-5] A written contract which is the foundation of a cause of action may be pleaded in *hæc verba* rather than according to its legal effect, either by setting forth a copy in the body of the pleading or by attaching a copy as an exhibit and incorporating it by reference. To justify this mode of pleading, however, the instrument thus made a part of the complaint must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege under the other mode. And if the instrument is not free from defect or ambiguity in those particulars, some definite construction must be put upon it by averment or the pleading will be subject to demurrer. 6 Cal. Jur. 478. In the first and third causes herein plaintiff pleaded the certificate by attaching a copy. It appears clear enough to us, and we are confirmed in our belief by the argument pro and con in opposing briefs herein, that a defect or ambiguity exists on the face of the certificate in respect to whether the language used therein imported and consisted in a direct promise to redeem and pay the certificate on December 31, 1931, or only contained the essentials of an option so to do at the election of defendant. By their averments in their complaints plaintiffs placed a definite construction upon the provisions in question when they alleged that defendant promised to redeem and pay on December 31, 1931, and that such promise was a material and controlling inducement to plaintiffs in the purchase of said stock. Such allegations did not purport to relate to an agreement collateral to that attempted to be expressed in the certificate pleaded, but in compliance with the rule above stated plaintiffs have eliminated the ambiguity of the certificate by putting a definite construction upon it by averment in their complaint and by way of interpretation. *Silvers v. Grossman*, 183 Cal. 696, 192 P. 534. These averments cured the uncertainty and ambiguity and presented issuable facts which could be determined by defense pleadings or

proofs at the trial, when the court passed upon and construed the instrument whose imperfection is thus put in issue. Code Civ. Proc. §§ 1856, 1860. Hence it follows that the special demurrer of this defendant is not well taken and could not be properly sustained; and if the contract to redeem and pay on December 31, 1931, as thus set forth in *hæc verba* with the aid of these averments is a valid and lawful contract, and the complaint otherwise states all essential facts, then the general demurrer to the first and third causes is likewise not well taken.

[6-8] It is contended by respondent that such a promise or agreement is void under the provisions of section 309 of the Civil Code as it existed at the date of the certificate, wherein directors of corporations were forbidden to divide, withdraw, or pay to the stockholders or any of them any part of the capital stock of the corporation. By the term "capital stock," as used in this section, is meant, not the shares of which the nominal capital is composed, but the actual capital, i. e., assets with which the corporation carries on its corporate business. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 468, 129 P. 582, 583, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013. In support of their contention respondents rely upon the cases of *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 P. 375, and *Chilberg v. Cross Land Co.*, 55 Cal. App. 678, 204 P. 28. These cases, with many others decided on similar facts, uphold the general rule that corporations in this state may not purchase their own stock, since the result would be to illegally withdraw and pay to the stockholder a part of the "capital stock." But a contract between a corporation and a purchaser of stock therein, whereby the corporation agrees to repurchase such stock upon certain conditions, is not to be denounced as illegal or a fraud on other subscribers and creditors of the corporation, where it is not shown that any fraudulent invasion of the rights of stockholders or creditors has been attempted or would result. *Newark Trust Co. v. Kriebel*, 49 Cal. App. 614, 193 P. 962. And in the case of *Schulte v. Boulevard Gardens Land Co.*, supra, where the facts and the status of the record of court proceedings were quite similar to those herein, the court said: "In the case at bar, however, we have something more than a mere attempt by a stockholder to sell, and by the corporation to buy, shares of stock. The plaintiff is seeking to enforce a part of an entire contract under which the stock was originally issued to him. The right to return the stock and to receive the sum agreed to be paid upon such return

was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties, it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay, upon a return of the shares, the sum agreed to be paid is not to be viewed as a new undertaking, arising after the plaintiff has assumed the relation of stockholder. The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulated terms." In the complaint in the case just quoted from it was alleged that the defendant corporation owned surplus profits exceeding corporate debts, and that defendant could comply with its contract without injury to any creditor or stockholder. In relation to which the court further said: "All that has been said is subject to the qualification that the rights of creditors are not to be affected by any arrangement between the purchaser of stock and the corporation. Undoubtedly a creditor of the corporation would be entitled to hold the conditional purchaser as a stockholder and to insist that the amount of his subscription be made applicable to the satisfaction of the corporate debts. In most of the cases cited by appellant, the courts were dealing with states of fact in which the rights of creditors were involved. But no such question arises here; the complaint alleging that the assets of the corporation are greatly in excess of its indebtedness. * * * Under the views stated, the complaint clearly states a cause of action on the agreement between Schulte and the defendant."

[9] In the complaint in the case at bar there is no allegation as to the status of corporate assets, and it is not alleged that there exist surplus profits exceeding corporate debts from which the redemption price of plaintiffs' stock could be paid without injury to any creditor or stockholder. This defect, respondents contend, is fatal to the sufficiency of the cause of action. On the other hand, appellants contend that such matter is defensive in character and need not be pleaded by plaintiffs. As the right to enforce a contract of the nature of the one herein is limited by the provisions of section 309 of the Civil Code, and as the recognition by the court of the right to enforce a similar contract in the Schulte Case was under an exception to the general rule and predicated on the affirmative showing in the

complaint that the "capital stock" would not be depleted contrary to the provisions of that section, we are constrained to hold herein that the absence of similar allegations in the complaint in this case leaves the first and third causes of action incomplete in an essential particular, and that therefore the general demurrer was well taken and properly sustained.

[10] The demurrers to the second and fourth causes of action were properly sustained. Counsel have characterized these causes as common counts for money had and received. They are not in the form of such common count, but are ordinary complaints in the form prescribed by the Code. Section 426, Code Civ. Proc.; *Union Bank & Trust Co. v. County of Los Angeles* (Cal. App.) 38 P.(2d) 442. Each is founded on an allegation that "defendants agreed to repay said sums," which entirely disassociates the cause of action from that embraced in the common count for money had and received. This latter form has developed and been grafted on our system of pleadings to enable recovery on the basis of an obligation implied by law, where there was no express contract and no real implied contract, in order to prevent defendant from an unjust enrichment at plaintiff's expense. *Philpott v. Superior Court*, 1 Cal.(2d) 512, 36 P.(2d) 635. This conclusion removes these causes of action from the category of the common count for money had and received, styled *indebitatus assumpsit*, and therefore from the effect of the rule which protects such common count from a general demurrer. *Union Bank & Trust Co. v. County of Los Angeles*, *supra*. Since the causes of action attempted to be set up in the second and fourth causes are patently the same causes as those attempted to be set up in the first and third causes, and are founded on the same facts and the same promise as therein set forth, it follows that plaintiffs, each respectively, have but one cause of action, it being the one arising out of the stock certificate transaction. For the same reasons given in our decision as to the lack of sufficiency of facts stated in the first and third causes of action, we must hold that neither the second nor fourth cause of action states facts sufficient to constitute a cause of action, and the general demurrers thereto were properly sustained.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

5 Cal.App.2d 396

ROBINSON et al. v. BARNARD.
Civ. 8886.

District Court of Appeal, Second District,
Division 1, California.

March 20, 1935.

1. Mortgages ☞32(1)

Deed absolute on its face, if intended as security for a debt, is mortgage.

2. Mortgages ☞39

Whether deed absolute in form is a mortgage is a mixed question of law and fact, to be determined from all facts and circumstances attending transaction.

3. Mortgages ☞38(1)

Mere giving of absolute deed and exclusive purchase agreement on land, already covered by trust deed executed as security for loan, does not show transaction to be a mortgage, in absence of sufficient proof that it was so intended.

4. Mortgages ☞39

Where owners of land, on which trust deed had been given as security for loan, executed deed absolute in form and agreement giving owners exclusive right of purchase, whether deed was intended to be mortgage was question of fact.

5. Mortgages ☞36

Party claiming deed absolute in form was intended as mortgage has burden of proving such intention.

6. Mortgages ☞38(2)

To justify finding that deed absolute in form was intended as mortgage, evidence must be clear, satisfactory, and convincing.

7. Mortgages ☞38(1)

Evidence sustained finding that deed absolute in form, which was executed to satisfy indebtedness and in connection with instrument giving owners exclusive right to purchase property before a certain time, was not intended as a mortgage.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Richard O. Robinson and others against Charles Barnard, in which defendant filed a cross-complaint. From a judgment for defendant on the cross-complaint, plaintiffs appeal.

Affirmed.

Walter Gould Lincoln, of Los Angeles, for appellants.

Blackstock & Rogers and Merle J. Rogers, all of Ventura, for respondent.

ROTH, Justice pro tem.

On December 28, 1925, as security for eleven several promissory notes payable to respondent Chas. Barnard, each due on December 28, 1930, appellants, as trustees, executed a deed of trust to Ventura County Title Company, as trustee, upon real property therein described; Chas. Barnard being named as beneficiary.

Prior to the maturity of the notes and thereafter, the parties had extensive negotiations for the liquidation thereof, pursuant to which extensions for payment were from time to time granted by respondent. These negotiations were devoid of any results and nothing was paid on account of said notes. The indulgence of respondent having been finally exhausted, appellants, in order to save themselves the cost of sale and other expenses incident thereto, did on July 6, 1931, execute to respondent a deed absolute on its face conveying to him the property described in the trust deed, in full and complete satisfaction and for the full and complete release of the indebtedness of \$18,000, plus accrued interest, delinquent taxes, and other proper charges. Contemporaneously with the execution of the deed absolute, a second instrument was executed entitled "An Exclusive Right to Purchase," the effect of which was to give appellants the exclusive right to purchase the property in question on or before October 2, 1931, for a sum which aggregated the principal of the original sum of \$18,000, plus interest, accruing costs, charges, and advances made by respondent, said total sum to be paid part in cash and part in notes, the notes to be secured by a trust deed on the identical property. The right to purchase granted as aforesaid was not taken up at the time granted or at all, but, instead, appellants on November 7, 1931, filed an action which prayed for varied relief, but the prime and specific purpose of which was to have the deed absolute and the exclusive right to purchase declared a mortgage. Plaintiffs allege in their complaint: " * * * That said instrument purported on its face to convey the entire estate in fee, without any conditions, but in reality it was given and intended to be given by the Plaintiffs, and was received, and intended to be received, by the Defendant Charles Barnard, as a Deed of Feasance, and was so given and received only as security for the payment of the said promissory notes. * * * "

Respondent denied the deed was to be anything other than what it purported on its face to be, and cross-complained, asking that his title to the property in question be quieted. The court found as a fact: " * * * That it is true that said plaintiffs did execute and deliver to said Charles Barnard a grant deed of the property described in said trust deed but it is not true that said deed was given or intended to be given or intended to be received by the defendant Charles Barnard as a deed of defeasance or as security for the payment of said or any promissory notes, or as security at all; that said deed was given by plaintiffs and received by defendant Charles Barnard as an absolute conveyance of said property. * * * "

Judgment went for respondent on his cross-complaint and from that judgment this appeal is taken.

There are numerous alleged errors claimed by appellants, but, other than the question to which we will shortly address ourselves, we do not consider any of them of sufficient importance to merit special treatment. It is enough to say that, even if appellants are correct with reference to all or any of said alleged errors (which we concede only arguendo), in view of our opinion on the one important point involved, they would not change the result.

As has been undoubtedly anticipated, the only question to be decided is, Was the deed absolute and the exclusive right to purchase, when considered together, a mortgage?

[1, 2] It is too thoroughly settled to be successfully disputed that a deed absolute on its face, if intended as security for a debt, is a mortgage. *Wehle v. Price*, 202 Cal. 394, 396, 260 P. 878; *Reynolds v. Hook*, 109 Cal. App. 226, 232, 292 P. 1000. It is equally well established, however, that "whether a deed, absolute in form, be a mortgage or not, is a mixed question of law and fact, to be determined from all the evidence, written and oral, and in determining it, all the facts and circumstances attending the transaction should be considered." *Reynolds v. Hook*, supra, page 233 of 109 Cal. App., 292 P. 1000, 1003.

[3] It is settled, too, that "the mere giving to the defendant by the plaintiffs of a conditional agreement to reconvey the land on or before a certain date, upon payment of a specified sum of money, and if not paid the agreement should become void and cancel itself, together with a verbal agreement for retention of possession by the defendant until that date, does not show the transac-

tion to be a mortgage, in the absence of sufficient proof that it was so intended." *Woods v. Jensen*, 130 Cal. 200, 62 P. 473.

The instruments in the case at bar, considered most favorably to the appellants, create no obligations of any kind. The deed certainly does not, and the exclusive right to purchase shows the contrary, for it is specifically provided, in the event the appellants fail to exercise their option under it, that it, that is, the right to purchase, "shall be automatically cancelled, terminated and rescinded."

[4, 5] What the intention of the parties was, for it is not manifested by the instruments, is a question of fact, and the burden is upon the appellants to show that the intention was that the instruments in question be treated as a mortgage.

[6] In *Wehle v. Price*, supra, at page 397 of 202 Cal., 260 P. 878, 879, the court says: "It must appear to the court beyond all reasonable controversy that it was the intention of not only one, but all, of the parties, that the deed should be a mortgage. 'A mere secret intention on the part of one of the parties, not disclosed or communicated to the other, will not have the effect of changing the character of the transaction. Still less, of course, will this result where the parties testify to directly contradictory intentions.' * * * The evidence must be 'something more than that modicum of evidence which appellate courts hold sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly expressed deed, solemnly executed and delivered. The evidence must be clear, satisfactory and convincing; explicit, unequivocal and indisputable. * * *'"

[7] Both sides introduced evidence on the question of intention, and the court found upon sufficient evidence contrary to appellants' contention. That finding is binding upon us. *Wehle v. Price*, supra; *Wadleigh v. Phelps*, 149 Cal. 627, 637, 87 P. 93.

The language of the Supreme Court of Missouri in considering a case on all fours with the case at bar is peculiarly appropriate: "The idea that this deed was given to the trust company as a mere security for their debt, and was intended to be merely an equitable mortgage that would have to be foreclosed by a proceeding in a court of equity, is not only repugnant to its terms, and those of the contemporary agreement, but is negated by all the circumstances attendant upon their execution and the conduct of the parties thereafter. At the time they were executed, the defendant had a deed

of trust on the property to secure its debt, and it is sheer nonsense to suppose that they would have exchanged this better form of security for such a mortgage." *Bailey v. St. Louis Union Trust Co.*, 188 Mo. 483, 87 S. W. 1003, 1005.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



5 Cal.App.2d 550

PEOPLE v. MARINO.
Cr. 1817.

District Court of Appeal, First District,
Division 1, California.

March 28, 1935.

1. Prostitution ☞ 1

Defendant who took girl to house of prostitution and induced her to practice prostitution *held* guilty of pandering.

2. Criminal law ☞ 808½

Instruction defining pandering in language of statute, though defendant was charged with but one of the various acts specified therein, *held* not error, where indictment was read to jury.

3. Criminal law ☞ 758

In prosecution for pandering and contributing to delinquency of minor, instruction that defendant was not required to testify, and that his testimony should not be rejected merely because he was defendant, *held* not prejudicial as suggesting that defendant needed defense.

Appeal from Superior Court, San Francisco County; I. L. Harris, Judge.

Russell Marino was convicted of pandering and of contributing to the delinquency of a minor, and he appeals.

Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Scibert L. Sifton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Appellant was charged with the commission of three crimes; pandering, pimping, and

contributing to the delinquency of a minor. These charges were consolidated, and the evidence as to all three was presented to one jury. Appellant was acquitted of the offense of pimping, but was found guilty of the other two offenses. Motion for new trial was made and denied. This is an appeal from the order and from the final judgment of conviction.

[1] The main point relied upon for a reversal is that the evidence is insufficient to show appellant was guilty of pandering, but at most shows appellant to have been guilty of contributing to the delinquency of a minor, of which crime he was found guilty. In this connection the indictment charged that appellant did procure for one Julie Haley, a female person, a place in a house of prostitution. The evidence is of a sordid character, and it is not necessary to review it in detail. So much of it as is necessary to a proper discussion of the point raised shows that one Lawrence Avenell sent a letter to Julie Haley, a school girl residing with her parents in Fresno, informing her that, if she would come to San Francisco, he could find employment for her. Upon her arrival, he took her to the apartment of one Lea Wood, who was conducting a house of prostitution. Appellant was consorting with the Wood woman, receiving money from her and keeping an account of her receipts and expenditures. The prosecuting witness met appellant when Avenell brought her to the Wood establishment. On this day the Wood woman had been given notice to move by the owner of the premises. Appellant then secured a new place for her to go. He paid a deposit on the rent of the new premises and received a receipt made out to him. Appellant then proceeded to move some of the possessions of the Wood woman to the newly rented apartment. The prosecuting witness was told to go with him. On their arrival at that place, appellant discussed the subject of prostitution with her, and informed her what she would have to do with men who called. He succeeded in inducing her to have sexual relations with him, and appellant spent most of the night with her. The next day appellant and the Wood woman again discussed with the prosecuting witness what she would have to do as a prostitute. While carrying on her acts of prostitution with different men, the Wood woman directed the prosecuting witness to be present so she would become familiar with her duties. The young victim thereafter engaged in prostitution. On account of her youthful appearance and slight stature, the Wood woman and appellant dis-

cussed the prospect of placing the young girl in an oriental location frequented by Chinese patrons. Before this scheme could be carried out, all the parties were arrested and this prosecution followed.

It is appellant's contention under these facts that he did not procure a place in a house of prostitution for the prosecuting witness, as the procurement for her had already been accomplished by another and the crime completed before he even knew of her existence. The objection is without merit. It is true that on the day appellant met the prosecuting witness she had been brought to the apartment of the Wood woman by another, but before any prostitution was practiced by the prosecuting witness she was removed by appellant to the new apartment for the purposes of prostitution. Upon arriving at this place, she immediately became an occupant of the place procured by appellant, and immediately thereafter she practiced prostitution. Appellant therefore accomplished the procuring and placing of the prosecuting witness in a house of prostitution within the meaning of the statute.

[2] Appellant next complains of an instruction to the jury defining the crime of pandering. The trial court defined the offense in the language of the statute. In this connection, appellant contends that, as he was not charged with all of the various acts specified in the pandering statute, but with only one of them, to instruct the jury as to all of these acts confused and misled them to his prejudice. The court read to the jury the three indictments, and as to the pandering indictment instructed it that appellant was charged with having willfully, unlawfully, knowingly, and feloniously procured for one Julie Haley, a female person, a place as an inmate in a house of prostitution. Under such circumstances, the jury could not have been misled to the prejudice of appellant. *People v. Burns*, 63 Cal. 614; *People v. Cain*, 7 Cal. App. 163, 93 P. 1037; *People v. Schmah*, 62 Cal. App. 192, 216 P. 624.

[3] And finally appellant complains of an instruction touching the right of a defendant in a criminal case to be or not to be a witness. The court instructed the jury in substance that a defendant in a criminal case cannot be compelled to be a witness against himself, but, if he offers himself as a witness, as was done here, he may be cross-examined as to all matters upon which he was examined in chief; that it was the duty of the jury to carefully weigh and consider his testimony

in the same manner as other witnesses', and not reject it merely because he was the defendant in the case. It is claimed that this instruction was unnecessary and injurious to the appellant, as it implied that appellant needed defense because of the fact that he was the defendant. This same question was before this court in the case of *People v. Cascino*, 137 Cal. App. 73, 29 P.(2d) 895, where it was held that such an instruction was not prejudicial.

The order and judgment are affirmed.

We concur: KNIGHT, J.; CASHIN, J.



5 Cal.App.2d 356

OTTNEY et al. v. FINNIE.

Civ. 5237.

District Court of Appeal, Third District,
California.

March 19, 1935.

Hearing Denied by Supreme Court
May 16, 1935.

1. Clubs ⇐3

In action for damages by members of proposed club against promoter, evidence showed that promoter had breached contracts by refusing to complete membership list and to construct improvements of the property.

2. Clubs ⇐3

Members of proposed club were entitled to recover membership fees and moneys expended in improving individual properties where promoter breached contracts by refusing to complete membership list and make promised improvements.

3. Clubs ⇐3

Where contract for completion of membership list and improving property of proposed club did not specify when list should be completed and improvements made, promoter was obliged to perform contract within reasonable time (Civ. Code, § 1657).

4. Contracts ⇐277(2)

In absence of stipulated time within which contract must be fulfilled, and demand therefor is necessary, such demand may be made within time limited by statute for maintenance of an action for breach of the contract or for termination thereof (Civ. Code, § 1657).

5. Limitation of actions ⇐46(3)

Where contracts for completion of membership list of proposed club and making of improvements did not specify time for performance by promoter, statute of limitations began to run upon election of members to rescind contracts upon promoter's refusal to proceed further, and action brought within four years thereafter was not barred by limitation (Civ. Code, § 1657; Code Civ. Proc. § 337).

6. Appeal and error ⇐1051(1)

Alleged error in admission of evidence was harmless, where there was ample other competent evidence concerning the matter.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Action by Garth Ottney and others against R. J. Finnie. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Seth Millington, of Gridley, and Ralph W. Rutledge, of Colusa, for appellant.

Rich, Weis & Carlin, of Marysville, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment which was rendered against him in a suit instituted by the nine plaintiffs herein to recover the purchase price which each paid, together with damages for costs expended by each incident to contracts for undivided interests in real property and for memberships in a country club to be established and maintained by the appellant thereon. The complaint contains nine counts, each one of which specifies the separate claims of a plaintiff. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiffs. A judgment against the defendant was rendered accordingly.

The respondents claim that the evidence in support of the judgment shows breaches of the membership agreements and an abandonment of the enterprise by the defendant, entitling the plaintiffs to a return of the money which they paid for their respective interests in the property, together with the amount of money each expended for improvements which they constructed on the property in reliance upon the fulfillment of the contracts on the part of the defendant. The appellant seeks to reverse the judgment on the grounds that the evidence fails to show breaches or an

abandonment of the agreement on his part, and that the action is barred by the provisions of the statute of limitations.

There is some conflict of evidence regarding the alleged breaches of contracts on the part of the defendant, but the following facts are sufficiently supported by the record: The defendant purchased 157 acres of mountain land in Shasta county about fifty miles east of Redding, known as "Brokeoff Meadows," through which the Manzanita creek flows. He bought this land for \$6,240 in 1925. He also owned two lots at Juniper lake in Lassen county. In 1927 he conceived the idea of converting this property into a country club and selling 200 undivided interests therein, entitling each purchaser to membership in the club with all privileges incident thereto, including the right of each member to select a site upon which he could construct and use his own cabin. The members were to enjoy the privileges of the use of the property to the exclusion of others. The membership interests were to cost \$600 evidenced by promissory notes payable in four annual installments, upon the satisfaction of which the defendant agreed to execute to the purchasers deeds of conveyance to their respective interests therein. Upon the sales of membership interests in the property brief uniform memorandums in writing were prepared by the defendant and signed by the purchasers. Only three of those memorandums of sales were also signed by the defendant. Apparently he retained these documents in his possession. They were not dated, and they contained no specified time within which the defendant was to complete the securing of the 200 members or the construction of the improvements which he agreed to make on the premises, except the following clause: "Upon completion of the membership you (the defendant) are to construct a Lodge upon the property which shall be known as the Brokeoff Mountain Alpine Club and agree to spend in road improvement and in the construction of said lodge with equipment not less than \$20,000.00." Only members of the club were entitled to use the property. The written memorandums of sales provide in that regard: "I (the purchaser) am to be entitled to possession of said premises after June 1, 1927, in common with other persons *executing agreements similar to this agreement.*" An elaborate printed prospectus advertising the advantages of membership in the club was issued by the defendant and delivered to the purchasers of interests in the property, in which it was stated that "thousands of dollars" would be ex-

pendent in improvements, that "only the Club members and their guests are allowed on the property," and that, "This property is to be placed in trust for the absolute security of your investment and the carrying out of the membership agreement." Regarding the nature of the improvements which the defendant agreed to make on the property, he testified without objection as follows: "Q. Now you have heard the testimony of these plaintiffs and others regarding * * * an electric lighting plant * * * and the swimming pool and the golf course and other items, those things were talked of were they not? A. Yes sir, those things were all contemplated and were all talked of and they were all more or less to be included in the expenditure of the \$20,000 when that \$20,000 was available after these memberships were sold."

The defendant testified that he sold about 40 memberships from 1927 to 1931, including those which were purchased by the plaintiffs, but that only 17 contracts were in force at the time of the trial of the suit; the others having been forfeited for nonpayments on the part of the purchasers. He admitted that he had not sold any memberships after 1931, claiming that the depression prevented further sales. He admitted that he had collected \$8,979, on account of sales of shares in the property, and that he had expended in the construction and maintenance of the clubhouse the sum of \$2,000, and in the building of the roadway the additional sum of \$3,000. Both the clubhouse and the roadway were permitted to deteriorate. There is evidence that the clubhouse windows were broken, the roof leaked, and the floor was out of repair. The roadway was nearly impassable; the dam which impounded the water of Manzanita creek for a swimming pool had gone out during flood water, and the swimming pool was abandoned; the golf course had not been constructed nor the lighting plant installed. No other improvements were made. Cabins were leased to strangers in violation of the agreement, and they were accorded privileges of the use of the property by the consent of the defendant. March 16, 1932, the defendant met with several of the plaintiffs in the office of Mr. Seth Millington at Gridley, during which conference the plaintiffs complained of the failure of the defendant to comply with his agreements and demanded the prompt fulfillment of the terms of the contract on his part, including the conveyance of the property to trustees who were then selected. A written agreement to that effect was immediately prepared by the plaintiff Millington and forwarded to the defendant, which was not signed or

returned by him. Several of the plaintiffs testified that the defendant then said that he was interested in promoting another hotel property at Viola, where the defendant had lived for three years past, and that he did not intend to continue to sell shares in the Broke-off Meadows property. It was conceded that the last share in the last-mentioned property was sold in 1931 to a man by the name of Peart, who defaulted in his payments and forfeited his interest therein. In the spring of 1933 each of the nine plaintiffs served notice of rescission of their contracts and demanded the return of their membership payments, together with the money which they had expended in constructing cabins and improvements on the property. This suit was commenced April 5, 1933.

This is not a suit for specific performance to enforce the provisions of a written contract for an interest in real property. It is an action for damages for the breach of agreements to convey undivided two-hundredths interests in real property together with memberships in a country club to be established thereon, including the enjoyment of benefits to be derived from improvements costing \$20,000 to be constructed thereon within a reasonable time. The damages also include the money expended by some of the plaintiffs for cabins and improvements placed by them on the premises in reliance upon the fulfillment of the contracts on the part of the defendant. Nine individuals joined in the complaint. The claims for reimbursement of each plaintiff are specifically set out in separate counts of the pleading. While it is not alleged that written contracts were executed, the specific terms of the membership agreements were alleged together with the breaches and the abandonment thereof by the defendant and a subsequent serving of notice of rescission of the contracts and demand for the return of the money expended by each of the plaintiffs on account thereof. The answer denies the material allegations of the complaint, but admits the making of the membership agreements which it is asserted were confined to the terms of the written memorandums thereof. The answer acknowledges the receipt on the part of the defendant of the sums of money alleged to have been paid to him, and that he agreed to expend \$20,000 in improvement of the premises "after he had secured 200 members" for the club, which he was unable to accomplish on account of the depression. The answer also pleads the bar of the suit by the statute of limitations.

The court found that from June 30, 1927, to September 1, 1929, the defendant entered into

agreements with the various plaintiffs for memberships in the country club as alleged in the complaint pursuant to which they paid the defendant membership fees and interest on deferred payments thereof, the following amounts: Ottney, \$665.74; Knock, \$557.82; Long, \$600; Taylor, \$579.60; Lawrence, \$600; Pence, \$550; Wilson, \$600; Craig, \$680; and Millington, \$564. In addition thereto the following named plaintiffs expended in improvements constructed on the premises in reliance upon the defendant's contracts with relation thereto the following amounts: Ottney \$850, Knock \$749.22, and Pence \$1,269.50, no part of which sums had been repaid; that the defendant agreed to expend \$20,000 in improvements, but that the contracts did not specify the time within which the improvements were to be constructed, but that after the lapse of a reasonable time therefor, the defendant failed, neglected, and refused to complete the membership list or construct the improvements and abandoned his contracts; that the defendant breached the terms of his contracts by expending for improvements not more than \$5,000, and by failing within a reasonable time to adequately construct and maintain the clubhouse or roadway, together with other promised improvements, by failing to complete his membership list, by renting cabins and permitting persons who were not members of the club to occupy and use the premises, and by failing and refusing after demand therefor to convey the property to trustees for the benefit of the members, contrary to the provisions of the agreements. It was also found that adequate notices of rescission of the contracts were served, together with demands for the return of the money expended by each plaintiff, and that the action was not barred by the provisions of the statute of limitations. Thereupon judgment was rendered in favor of the plaintiffs for the sums above specified, together with interest thereon. From this judgment the defendant has appealed.

[1, 2] The findings and judgment are sufficiently supported by the evidence. While there is a conflict of evidence in that regard, the record supports the finding to the effect that the defendant abandoned his contracts and refused to complete his membership list of the country club, or to construct the improvements of the property agreed upon. The plaintiffs and other witnesses testified to that fact. The written memorandums of agreements specify that "*upon completion of the membership you (the defendant) are to construct a Lodge upon the property * * * and agree to spend in road improvement and*

in the construction of said lodge with equipment not less than \$20,000.00." Six years elapsed after the making of the first contract before this action was commenced. Over four years elapsed after the making of the last contract which is involved in this suit before the contracts were rescinded by the plaintiffs. For approximately two years the defendant apparently made no effort to sell memberships in the country club. We are satisfied that not only does the evidence support the finding that the defendant abandoned his contracts, but it also shows that his failure to complete the membership list of the country club and construct the improvements agreed upon for an unreasonable period of time constitutes a breach of the contracts upon which the plaintiffs are justified in maintaining their suit to recover the money which they expended pursuant thereto.

[3] Since the contracts specify no limitation of time within which the membership list was to be completed or the improvements made, the law affords a reasonable time therefor. Section 1657, Civ. Code; *Williams v. Bergin*, 116 Cal. 56, 47 P. 877; 6 Cal. Jur. p. 218, § 143; 6 R. C. L. p. 646, § 60. Section 1657 of the Civil Code provides in that regard: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." The question as to what constitutes a reasonable time for the performance of acts depends upon the circumstances of each particular case.

[4] It has been held that in the absence of a stipulated time within which a contract must be fulfilled, where a demand therefor is necessary, that such demand may be made within the time limited by statute for the maintenance of an action for breach of the contract or for the termination thereof. *Meherin v. San Francisco Produce Exchange*, 117 Cal. 215, 48 P. 1074, 1075; *Caner v. Owners Realty Co.*, 33 Cal. App. 479, 165 P. 727; *Tisdale v. Bryant*, 38 Cal. App. 750, 177 P. 510. In the *Meherin* Case, *supra*, it is said in that regard: "What is to be considered a reasonable time for this purpose [of demand] does not appear to be settled by a precise rule. It must depend on circumstances. If no cause for delay be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action."

The appellant contends that the statute of limitations began to run in the present case from the dates upon which the final payments were made by the respective plaintiffs upon their membership agreements, and that this

action is therefore barred against all of them. In support of his claim in that regard, the text in 16 California Jurisprudence, p. 522, § 121, is cited as follows: "When upon full performance by the purchaser of a contract to convey land the vendor refuses to convey as agreed, the purchaser may sue to recover back the purchase money paid. And if the contract contains no provision for a demand for a deed to put the vendor in default, the statutory period runs from the date of the last payment made under the contract, without the necessity of a demand either for the deed, or for the return of the money paid under the contract."

In the present case, however, the contracts were not merely for the purchase of an interest in the real property and the conveyances of those interests by deeds. The chief consideration for the payments of membership fees was the securing of 200 members of the club and the expenditure of \$20,000 by the defendant in improvements to supply a clubhouse, roadway, and all the benefits of a country club organization. The authorities cited in support of the preceding text, upon which the appellant relies, are cases in which no consideration was involved except the conveyance of land upon the payment of the specified purchase price therefor. That text has no application to the situation which exists in this case.

The portion of the text in 16 California Jurisprudence, § 121, which follows the above-quoted language does apply to the circumstances of this case. It reads: "Where no express time of performance is fixed, a purchaser is not obliged to treat the contract as abandoned upon its breach, but has his election still to rely upon it; and the statute does not commence to run against a right of action to recover money paid under the agreement until there is an election no longer to rely upon the contract and to sue for the money paid."

[5] The chief consideration for which the plaintiffs in this case paid their money was the promise of the defendant to secure the 200 members of the club and to expend \$20,000 in improvements. The appellant claims that this expenditure was not required of him except "upon completion of the membership." The statute of limitations, therefore, began to run when the defendant abandoned his contract to secure the membership, or when the plaintiffs elected to declare the contracts void for

the breach thereof by the defendant. At the conference which occurred in the law office of Mr. Seth Millington, March 16, 1932, for the first time the defendant declared that he would attempt to sell no more memberships. The plaintiffs then elected to declare their reliance upon the defendant's breach of contracts, and then demanded the return of their money. We are of the opinion the statute of limitations began to run at that date. The written memorandums of membership in the club together with the printed prospectus may be deemed to constitute the contracts between the respective parties. These documents should be construed as parts of the same contract. Section 1642, Civ. Code. The statute of limitations therefore authorized the commencement of this action within four years from March 16, 1932. Section 337, Code Civ. Proc. This action was therefore not barred by the statute of limitations. The suit does not purport to be based on the doctrine of assumpsit. It is similar to the case of *Monteverde v. Brooke Realty Company*, 65 Cal. App. 435, 224 P. 247, which is determinative of the question involved.

[6] The appellant contends that the court erred in admitting evidence, over his objection, of agreements on the part of the defendant to construct improvements on the property other than the clubhouse and roadway, on the ground that such evidence varies the terms of the written contracts. Assuming that the written memorandums constitute the contracts between the parties, notwithstanding the fact that the defendant did not sign them, the appellant admitted, without objection thereto, that "those things were all contemplated * * * and they were more or less to be included in the expenditure of the \$20,000.00." Moreover, the challenged evidence of a failure to perform covenants other than the construction of the clubhouse and roadway, mentioned in the memorandum contract, is harmless, for there is ample evidence that independently of the other omissions the defendant abandoned his contract to secure 200 members of the club and failed to construct and maintain the clubhouse or roadway in the manner agreed. The evidence objected to is merely cumulative and therefore harmless.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

5 Cal.App.2d 162

CEIKIN et al. v. GOLDMAN et al.

Civ. 8862.

District Court of Appeal, Second District,
Division 1, California.

March 7, 1935.

1. Automobiles ☞181(1)

"Willful misconduct" within statute relating to injury of automobile guests implies at least the intentional doing of something with knowledge that serious injury is a probable, as distinguished from a possible, result, or the intentional doing of an act with a wanton and reckless disregard of its possible result (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles ☞181(1)

Driving into intersection at 25 miles an hour with right view obstructed by child sitting in lap of another sitting in front seat held not "willful misconduct" rendering automobile hosts liable to injured guests (St. 1931, p. 1693, § 141¾).

3. Appeal and error ☞110

No appeal lies from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by Eunice Ceikin and Ducia Ceikin, minors, by Max Ceikin, their guardian ad litem, against Joe Goldman and Sarah Goldman. From judgment for plaintiffs and from an order denying motion for new trial, defendants appeal.

Judgment reversed, and appeal from order denying new trial dismissed.

Hindman & Davis, of Los Angeles, for appellants.

David Ziskind, of Los Angeles, for respondents.

ROTH, Justice pro tem.

This is an appeal by defendants from a judgment rendered in favor of two minor plaintiffs, who were riding as guests in an automobile of defendants, and from an order denying motion for a new trial. The only question presented is whether or not the evidence is sufficient to sustain the findings of the court which substantially and impliedly recite that the defendants were guilty of misconduct within the meaning of

section 141¾ of the California Vehicle Act, as amended in 1931 (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

The evidence discloses that in loading a two-door Chevrolet coach, with five-passenger capacity, Mrs. Goldman, her year and a half old baby, her husband's twelve year old nephew and Eunice Ceikin, one of the injured minors, arranged themselves in the back seat. Joe Goldman sat in the driver's seat. Mrs. Ceikin, the mother of the injured minors, requested her daughter Ducia, the other injured minor, also to get into the back seat, but Ducia had already taken her place beside Mr. Goldman, and Mrs. Goldman insisted that Ducia sit in the front seat so that the baby could lie down and go to sleep. Mrs. Ceikin then got into the right front seat, which would place her immediately contiguous and to the right of the child Ducia. Joe Goldman testified that the child Ducia "started to sit on half of my seat * * * and I was afraid it would interfere with the shifting of my gears, so I told her to sit on her mother's lap." He did not remember whether Mrs. Ceikin said anything to this suggestion, but Mrs. Ceikin testified that she told him "it would block his view, if I held her in that position * * * and he said 'that is perfectly all right, let her sit there.'" Goldman testified directly that sitting on her mother's lap the child Ducia did obstruct his vision to the right, and he did notice it at the time the party started. As they proceeded a few blocks and approached the intersection of Seventh avenue and Montclair street in the city of Los Angeles, Goldman testified he was proceeding at about 25 miles per hour. Mrs. Ceikin said 30. He proceeded across the intersection at that speed and did not see the car coming from the right. When approximately in the center of the intersection, the Chevrolet car was struck on its right side midway between the cowl and the right door by a car coming from the east. The record reveals, further, that the speed at the intersection in question was limited by law to 15 miles per hour, and that Mrs. Ceikin told Mr. Goldman before he entered the intersection, that he was going too fast, although Goldman testified he did not remember such admonition.

Considering the comparatively brief lapse of time since the 1931 amendment to section 141¾ of the California Vehicle Act, the appellate courts of this state have been called upon numerous times to define willful mis-

conduct as contained in that section, as is evidenced by the following cases: *Gibson v. Easley*, 138 Cal. App. 303, 32 P.(2d) 983; *Browne v. Fernandez*, 140 Cal. App. 689, 36 P.(2d) 122; *Squiar v. McLean* (Cal. App.) 39 P.(2d) 437; *Crawford v. Herzog* (Cal. App.) 40 P.(2d) 954; *Olson v. Gay*, 135 Cal. App. 726, 27 P.(2d) 922; *Forsman v. Colton*, 136 Cal. App. 97, 28 P.(2d) 429; *Norton v. Puter*, 138 Cal. App. 253, 32 P.(2d) 172; *Manica v. Smith*, 138 Cal. App. 695, 33 P.(2d) 418 (rehearing); *Sanford v. Grady* (Cal. App.) 36 P.(2d) 652; *Turner v. Standard Oil Co.*, 134 Cal. App. 622, 25 P.(2d) 988; *Howard v. Howard*, 132 Cal. App. 124, 22 P.(2d) 279; *Walker v. Bacon*, 132 Cal. App. 625, 23 P.(2d) 520; *Horning v. Gerlach*, 139 Cal. App. 470, 34 P.(2d) 504; *Meek v. Fowler* (Cal. App.) 35 P.(2d) 410; *Lennon v. Woodbury* (Cal. App.) 40 P.(2d) 292.

[1] We believe the rule as to what constitutes willful misconduct is correctly laid down in the case of *Howard v. Howard*, 132 Cal. App. 124, 129, 22 P.(2d) 279, 281, in which case a hearing was denied by the Supreme Court, where the court says:

"Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result."

The same rule is reiterated in the case of *Turner v. Standard Oil Co.*, 134 Cal. App. 622, at page 626, 25 P.(2d) 988, 990, where the court says:

"'Willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result."

We recognize that general language is often susceptible to different constructions, especially when subjected to the interested and rigorous scrutiny of opposing litigants. We have therefore perused the foregoing cases and analyzed the facts therein in order to determine what application the rule announced has received. These cases show without doubt that courts are endeavoring to distinguish and are distinguishing between willful misconduct and negligence, however gross, and hold without exception that there

must be something more than negligence or gross negligence in order to constitute willful misconduct. We are satisfied without such analysis that the facts in the instant case indicate nothing directly and nothing from which it can be implied that the defendants in this case intentionally had failed to do anything "under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." *Turner v. Standard Oil Co.*, supra. A study of the cases mentioned confirms us in this opinion.

[2] The findings of the trial court that the defendants were guilty of willful misconduct in loading the car and were guilty of willful misconduct in driving the same at a dangerous and unlawful rate of speed are not supported by the evidence.

[3] The judgment is reversed. The appeal from the order denying motion for new trial is dismissed, as there is no appeal from such an order.

We concur: CONREY, P. J.; YORK, J.



STILLWELL HOTEL CO. v. ANDERSON

et al. *

Clv. 9456.

District Court of Appeal, Second District,
Division 2, California.

March 18, 1935.

Hearing Granted by Supreme Court
May 16, 1935.

1. Appeal and error ⇐499(2)

On appeal from judgment, entered after entry of order sustaining demurrer to complaint without leave to amend, order denying leave to amend could not be assigned as error, where record failed to show that leave to amend was asked and refused between dates of order and judgment.

2. Landlord and tenant ⇐53(2)

Where purchaser took property subject to deed of trust and later took assignment of lease which had been executed by trustee, relation between lessee and purchaser was that of landlord and tenant, but assignment did not create privity of contract so as to make purchaser liable for breach of terms of lease, notwithstanding purchaser agreed with

trustee to be bound as lessor by all of the obligations of lease (Civ. Code, § 1559).

3. Landlord and tenant ⇨53(2)

Bare assignment of lessor's right, title and interest in lease to assignee, who previously had acquired title to property leased, imports no agreement to assume obligations of lease by assignee so as to make assignee liable for failure to comply with lease (Civ. Code, § 1559).

4. Pleading ⇨312

Allegation inconsistent with terms of written instrument, which is pleaded verbatim, must be disregarded.

5. Landlord and tenant ⇨53(2)

In absence of agreement respecting performance of lease between lessee and lessor's assignee, who previously had acquired title to property, no privity of contract arose between assignee and lessee so as to make assignee liable for breach of terms of lease, where lessee previously had agreed in lease to look to owner of property and not lessor, who held property as trustee for owner, for performance of lease (Civ. Code, § 1559).

6. Contracts ⇨187(1)

Contract for benefit of third person must have been made expressly for such person, and, to sustain action thereon, there must have been an intent clearly manifested on part of contracting parties to make obligation inure to his benefit; doubts whether parties intended to make contract for benefit of third person being resolved against such third party (Civ. Code, § 1559).

7. Landlord and tenant ⇨53(2)

Assignment of lease from lessor to assignee who agreed with lessor to be bound as lessor by obligations of lease held not a contract for benefit of lessee so as to give lessee right of action against assignee for failure to perform obligations of lease (Civ. Code, § 1559).

8. Pleading ⇨8(6)

In action by lessee against lessor's assignee for damages when lessee was evicted after assignee had defaulted in payment of mortgage bonds and trustee had foreclosed and sold property, complaint held demurrable, where lessee failed to allege facts from which court could determine validity of sale, notwithstanding lessee alleged that sale was valid, since allegation, being conclusion of law, must be disregarded (Code Civ. Proc. § 1161a).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by the Stillwell Hotel Company against William H. Anderson and another. From a judgment in favor of William H. Anderson, after entry of an order sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

J. E. Stillwell, of South Pasadena, and Robert E. Austin and John N. Helmick, both of Los Angeles, for appellant.

Le Roy M. Edwards and O. C. Sattinger, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

[1] This is an appeal from a judgment entered in favor of respondent, William H. Anderson, after order sustaining, without leave to amend, his demurrer on both general and special grounds to a second amended complaint against respondent and Business District Development Company, a corporation (hereinafter referred to as the company), wherein appellant sought to recover damages for eviction. The record fails to show that leave to amend was asked and refused between the dates of order and judgment; hence no error may be claimed in that respect, and appellant, having declined to amend, must stand upon his pleading as against the demurrer on both its general and special grounds. *Haddad v. McDowell*, 213 Cal. 690, 3 P.(2d) 550.

Confining the statement of facts in the complaint to those pertinent and essential to the questions raised by the demurrer, it appears that the company was owner of certain real property and in 1925 had executed a deed of trust conveying the title thereto as security for an issue of bonds aggregating \$600,000, permission to issue and sell said bonds having been granted by the state corporation commissioner. The trust deed provided that upon default in payment of interest or the principal of any bond, and request in writing signed by 25 per cent. of the holders of outstanding bonds, the trustee might declare the principal of all bonds due, and sell the property, issue its deed, and divest the company, its successor and assigns, of title and claim thereto. On January 15, 1926, the company conveyed the property to Citizens' Trust & Savings Bank (hereinafter referred to as the bank) subject to said deed of trust, and the bank made its written agreement declaring that it held the property in trust for the company, and wherein it was provided that the bank was to lease and sublease the same as directed by the company, the lessees to look

only to the company as lessor; the company agreeing to perform in every particular any lease so executed. On October 20, 1926, the bank, at request of the company, executed a written lease of portions of said real property to plaintiff for a term of thirty years, wherein it was provided (a) that plaintiff should pay as rent 66⅔ of its net earnings from operation of said property and the building thereon as a hotel; (b) that plaintiff lessee absolved the bank, as lessor, from any liability thereunder, and agreed to look to the company only for strict performance thereof; (c) that the company agreed to perform the provisions thereof in the same manner as if it were lessor therein; (d) that said lease was subject to the bond issue and deed of trust securing it, and "that lessor agreed not to permit any default to occur in the mortgage or trust deed securing said bonded indebtedness"; and (e) that the terms, covenants, and conditions of said lease should be binding on the parties, their heirs, successors, assigns, and legal representatives. The company approved said lease in writing, wherein it agreed "to be bound by and carry out and perform and to guarantee the faithful performance of each and all of the terms, covenants and conditions contained in said lease to be kept and performed by the lessor."

Under this lease plaintiff went into possession, expended \$90,000 in furnishing the hotel, and established a successful business therein, with a net average income of \$2,000 per month up to December 1, 1932. On January 2, 1931, all the right, title, and interest of the company and of the bank in and to said real property had passed to defendant Anderson, subject to said deed of trust securing the bond issue; and it is then alleged that on that date the bank, in consideration that Anderson would bind himself to keep and perform all the covenants and agreements of said lease, executed its assignment of all its right, title, and interest in and to the lease to Anderson, who executed thereon an acceptance wherein it is provided that he "does hereby accept the assignment of the lease described in the foregoing, and does hereby agree to be bound as lessor by all the obligations thereof"; both the assignment and acceptance being set forth in *hæc verba*. It is further alleged that such acceptance agreement was executed for the express benefit of plaintiff as lessee, and that thereafter plaintiff performed the covenants and agreements of the lease for the benefit of defendant Anderson, and that the latter claimed all the rights, benefits, and privileges of said lease until he permitted default in the terms of

said trust deed and plaintiff was evicted by reason thereof.

On March 1, 1932, certain of the bonds aggregating \$20,000 "became due and payable and default was made in the payment thereof," and on September 1, 1932, "there became due and payable the interest on all of said bonds then outstanding in the sum of \$16,250, and default was made in the payment thereof." On October 10, 1932, the owners of more than 25 per cent. of outstanding bonds requested the trustee in writing to declare the principal of all the bonds due and payable and to proceed to sell said property as provided in said deed of trust. On October 11, 1932, the trustee gave notice in writing to the company and to defendant Anderson declaring the principal of all bonds to be immediately due and payable, and advertised a sale and on November 12, 1932, sold the property to Title Insurance & Trust Company as trustee for Mortgage Guaranty Company, the owner of all outstanding bonds. It is then alleged that said proceedings and sale were "in all respects in full compliance with the terms of the deed of trust and the provisions of law," and divested defendants of all title and interest in said property and terminated said lease of plaintiff; that on December 3, 1932, said Mortgage Guaranty Company demanded of plaintiff possession of said property and "served written notice and demand on plaintiff as provided by section 1161a of the Code of Civil Procedure to quit possession thereof within three days or it would institute proceedings against plaintiff for possession of said property and for recovery of damages"; that by reason of the termination of said lease plaintiff was compelled to and did quit possession of said premises on December 8, 1932, and as a result was forced to make immediate sale of its furniture and furnishings for \$16,000, although they were reasonably worth \$50,000, to its damage in the sum of \$34,000; that by reason of the termination of said lease it lost the use of said premises for 275 months, to its damage in the sum of \$200,000, demand for which sums have been made by plaintiff of defendants and defendants have refused to pay the same or any part thereof; and that there is now due and unpaid the sum of \$200,000.

[2-4] It is obvious from the facts alleged in the complaint, disregarding all conclusions of law therein, that, when respondent became owner of the real property and took the assignment of the interest of the bank as lessor, a privity of estate arose between respondent and appellant under the relationship of land-

lord and tenant, but that such assignment did not have the effect of creating a privity of contract between them. When the assignment of the lease was made to respondent, he was already the owner of the real property leased, subject to the deed of trust, and such assignment amounted only to a quitclaim of the bank's rights in the lease to respondent; neither the company nor appellant being parties thereto. The assignment was a naked assignment, and imports no agreement to assume any of the obligations of the lease (*Beazley v. Embree*, 41 Cal. App. 706, 183 P. 298), notwithstanding the allegation that in consideration of such assignment respondent would bind himself to keep and perform all the covenants and agreements of lessor in said lease. Such allegation, being inconsistent with the terms of the written assignment, which is pleaded in *hæc verba*, must be disregarded. *Peak v. Republic Truck Sales Corp.*, 194 Cal. 782, 790, 230 P. 948.

[5] But it is contended by appellant that, by the language of his written acceptance of such assignment, attached thereto, respondent came into privity of contract with appellant as to all the covenants and agreements of the lease, including the implied covenant of quiet enjoyment. The acceptance contained the provision, "does hereby agree to be bound as lessor by all the obligations thereof." The assignment was made by the bank. In the lease appellant, as lessee, absolved the bank, as lessor, from any liability under the lease and agreed to look only to the company for strict performance thereof; and the latter in its written approval of the lease agreed to carry out and perform its provisions as if it was lessor, and agreed not to permit any default to occur in the mortgage or trust deed securing the bonded indebtedness to which said lease was subject. The breach of covenant or agreement upon which appellant bases its claim for relief herein consists in the failure to comply with the provision not to permit any default to occur in the trust deed. By the terms of the assignment by the bank and the acceptance thereof by respondent, the latter did not assume the obligations of the lease, which imports a positive or active status as lessor, but agreed to be bound thereby, which imports a negative or passive status. This latter status was entirely consistent with respondent's existing status as owner of the real property on which the lease was founded. It thus appearing from the allegations of the complaint that no agreement was ever made between appellant and respondent respecting performance

of the obligations of the lease, no privity of contract arose and existed between them in respect thereto. *Bush v. Bastian*, 112 Cal. App. 644, 297 P. 976; *Farber v. Greenberg*, 98 Cal. App. 675, 277 P. 534. Moreover, no consideration is shown by the allegations of the complaint to have moved from either appellant or the company to respondent at the time of such assignment. Respondent was already the owner of the property and entitled to the benefits accruing from the lease by virtue of a previous transfer of the title to him subject to the trust deed. *Fahrenbaker v. E. Clemens Horst Co.*, 209 Cal. 7, 284 P. 905. This status of title rendered the execution of the assignment and its acceptance a mere formality to eliminate the bank from the picture, as its functions and purposes as trustee of the company had terminated with the transfer of title to respondent and did not change or affect the rights and obligations existing at the time between respondent, as owner and landlord, and appellant, as tenant and lessee.

[6] Appellant relies on its allegation that such acceptance agreement was made for the express benefit of appellant. This allegation is a mere conclusion of the pleader and is not consistent with the terms of the instruments pleaded in *hæc verba*. Under section 1559 of the Civil Code and the established rule, a contract for the benefit of a third person must have been made expressly for such third person; and to sustain an action thereon by such third person there must have been an intent clearly manifested on the part of the contracting parties to make the obligation inure to the benefit of the third party; and, where there is any doubt respecting the matter, it should be resolved against the right of such third party to claim benefit of such contract. *Wilson v. Shea*, 29 Cal. App. 788, 157 P. 543; *Case v. Egan*, 57 Cal. App. 453, 207 P. 388.

[7] It being manifest from the allegations of the complaint that the bank was without personal liability under the lease, its naked assignment thereof to respondent could pass no personal liability to him. No privity of contract between appellant and respondent appearing, and no sufficient facts being alleged to show that the acceptance of the assignment was made for the benefit of appellant, it follows that no obligation attached to respondent to see to it that no default should be permitted to occur in the trust deed. That obligation was assumed by the company, and appellant had agreed to look to it only for performance.

[8] Moreover, the eviction claimed herein is founded on termination of the lease by reason of alleged defaults in payment on the bonds and a sale and transfer of title under the trust deed by the trustee. The regularity and validity of the trustee proceedings are vital to plaintiff's case. Yet the trust deed provisions relating to conditions, notice, and manner of sale are not alleged either according to their legal effect or in *hæc verba*, but the pleader is content with the general allegation that such proceedings and sale were "in all respects in full compliance with the terms of the deed of trust and the provisions of law." This is a conclusion of law, and must therefore be disregarded. The omission of the facts upon which the validity of the sale rested render the cause of action deficient in an essential element. This defect might have been cured by appropriate allegations in an amended pleading, but no request therefor was made by appellant.

For the reasons above given, the general demurrer was properly sustained, and it becomes unnecessary to consider and pass upon other points raised.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 345

RINALDO v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA
et al.

Civ. 9360.

District Court of Appeal, Second District,
Division 2, California.

March 19, 1935.

Hearing Denied by Supreme Court
May 17, 1935.

1. Pleading ⇨214(1)

On demurrer to a petition, statement of facts contained in petition must be presumed true.

2. Physicians and surgeons ⇨11(3)

Board of medical examiners acquired personal jurisdiction over physician to revoke physician's license, where physician was cited to appear at hearing, had reasonable notice thereof, and an opportunity to be heard (St. 1913, p. 722, as amended).

3. Certiorari ⇨68

Certiorari can be used only for purpose of determining whether trial court or board exceeded its jurisdiction, and cannot be used for purpose of determining whether evidence is sufficient to support particular order complained of, providing inferior tribunal had jurisdiction.

4. Physicians and surgeons ⇨11(3)

Where board of medical examiners acquired personal jurisdiction over physician, its determination on hearing based on evidence is an exercise of board's jurisdiction and not void for want of power so as to make action subject to review by certiorari, notwithstanding determination is erroneous (St. 1913, p. 722, as amended).

5. Certiorari ⇨64(2)

Sufficiency of evidence can be reviewed by certiorari, where there is total lack of competent evidence upon which adjudication sought to be reviewed was based, in which case evidence may be reviewed to determine whether jurisdictional facts were proven.

6. Physicians and surgeons ⇨11(3)

Determination of board of medical examiners, after hearing, on competent testimony that physician was not a graduate of a medical college and had not fulfilled educational requirements of Medical Practice Act as stated in application for license, that license should be revoked for fraud, held conclusive upon superior court on review by certiorari (St. 1913, p. 722, as amended).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

The Board of Medical Examiners of the State of California revoked the license of Eugene J. Rinaldo to practice medicine. From a judgment of the superior court, in certiorari proceeding which annulled the order, the Board of Medical Examiners of the State of California appeals.

Reversed.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty Gen., for appellant.

L. E. Dadmun, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

This cause is attaining an imposing bibliography. This is its fifth appearance before the appellate court of this district, and the history of its progress is contained in the following reports: 93 Cal. App. 72, 268 P. 1076; Id., 123 Cal. App. 712, 12 P.(2d) 32; Id., 123 Cal.

App. 719, 12 P.(2d) 35; and Id., 135 Cal. App. 613, 27 P.(2d) 671. The present case is an appeal from a judgment of the superior court, entered in a certiorari proceeding, annulling an order of the Board of Medical Examiners of the State of California, dated October 18, 1932, revoking the license theretofore issued to respondent to practice as a physician and surgeon in this state. Appellant contends that the lower court erred in overruling the demurrer and in adjudging that there was not sufficient evidence presented to the board to warrant the exercise of its jurisdiction or to warrant the revocation of respondent's license, and in annulling the board's order of revocation thereof.

[1] No error appears in the action of the court in overruling the demurrer. The petition for the writ contained a statement of facts which if true, as must be presumed on a hearing on demurrer, showed that no legal, competent, or proper evidence in support of the charges before the board was produced at the hearing.

The return on the writ set forth the complaint, answer, and notice on which the hearing was had on October 18, 1932, together with the reporter's transcript of proceedings at such hearing, including all the evidence produced before the board. The lower court reviewed the matter and annulled the order of the board revoking respondent's license, and the single remaining problem to be solved on this appeal is whether the judgment of the superior court is right.

The complaint was filed against respondent on April 28, 1924, and charged him with having procured from the State Board of Medical Examiners a reciprocity certificate and license to practice medicine by fraud and misrepresentation, in that he falsely stated in his application that he was the possessor of a medical diploma from the St. Louis College of Physicians and Surgeons dated and issued in the year 1908, and "that he had fulfilled all of the preliminary education required by the Medical Practice Act of the State of California" prior to his matriculation at the college above named, whereas in truth and in fact he did not have a diploma from said college of the year 1908 and was not a member of the 1908 class, and had never obtained a bona fide certificate of preliminary education, but had purchased the same from another.

The evidence taken at the hearing shows that the application of respondent for his reciprocity license, filed June 12, 1922, and marked herein as Exhibit 2, recited that re-

spondent had three years of study in the University of Prague, from 1899 to 1902, and four years in study of medicine and surgery, from September, 1904, to April, 1908, in the St. Louis College of Physicians and Surgeons, from which college he obtained a degree of Doctor of Medicine on April 27, 1908; that the application was based on a license or certificate of the Missouri State Board of Health, issued after a written examination on July 14, 1920, a copy of which license is attached to the application and containing thereon a certificate of the secretary of the State Board of Health of Missouri reciting that the applicant had presented to said board a diploma issued to him on April 27, 1908, by the St. Louis College of Physicians and Surgeons, that he had passed the regular written examination given by the board in June, 1920, that such license was in good standing, and that the applicant was a fit and proper person to receive a reciprocity certificate. Attached thereto is a certificate of an officer of St. Louis College of Physicians and Surgeons certifying that the applicant had entered that college September 1, 1904, and had presented evidence of preliminary education in the form of a certificate of the state superintendent of public instruction of Missouri showing credits for four years of high school, and that he had presented, as evidence of premedical education, a certificate of the said superintendent of public instruction showing two years of college work taken by written examination, and that he attended all lectures given by the institution during four years, and was issued a degree of Doctor of Medicine on April 27, 1908. On this application a license was issued to respondent on June 12, 1922, and was the license which the board revoked on October 18, 1932.

In support of the charges, there were offered the depositions of three witnesses, taken on October 17, 1928, and received in evidence under a preceding stipulation of the parties. The witness Brundidge testified in substance that he was a newspaper reporter of the Star Chronicle Publishing Company of St. Louis, Mo.; that he knew respondent in St. Louis; and that from 1918 to 1921, inclusive, respondent was operating a conservatory of music and teaching music in St. Louis, and was also leader of a band with the Welfare Association of the United Railways part of that time. He then identified an affidavit dated April 18, 1919, bearing the signed name "Eugene John Rinaldo," and stated that he first saw it in 1923 in the office of St. Louis College of Physicians and Surgeons; that it was handed

to him; and that he delivered it to the secretary of the California board. This affidavit was placed in evidence, marked Exhibit 1, and recites that the signer, Eugene John Rinaldo, had a certificate from the superintendent of public instruction of Missouri covering four years of high school, 16 units, and for 7 units of college work; that his medical education was in Pacific Medical College, Los Angeles, Cal., from October 15, 1912, to June 6, 1916, and his senior year in St. Louis College of Physicians and Surgeons from October 7, 1918, to —, 1919, and that he had also studied three years at the medical institute of Prague, Bohemia.

The witness Dr. R. Adcox testified in substance that he was student solicitor for St. Louis College of Physicians and Surgeons, and that he met respondent at his (respondent's) conservatory of music in St. Louis in August, 1918, by appointment; that respondent said: "I want to graduate in medicine and I want to go through like the druggist, your friend and my friend, did." "How much will it cost me"? And "I want to get through just as quick as I can, and I have had some high school but not enough perhaps to matriculate in medicine." That he (Dr. Adcox) told respondent that the high school certificate and credits for four years in medicine, with a trip to Los Angeles, would cost him \$1,000; that they agreed on \$800, which respondent paid; that he (Dr. Adcox) then procured from an assistant superintendent of public instruction of Missouri a certificate of high school credits, for which he paid \$15, and from a physician in Los Angeles he procured a certificate of four years of medical education in Pacific Medical College, for which he paid \$300; that he delivered these two certificates to respondent in St. Louis, at which time the latter said to him, "You know, I have no medical training whatever. Can I carry the senior work?" And, "I have no medical training and I have no high school certificate but I have had a few of these subjects over in the old country." That a few days later respondent asked the witness to help him enroll at the St. Louis College of Physicians and Surgeons in the senior class; that witness went with respondent to the college office, where respondent presented to the dean the Pacific Medical College certificate and the high school credits certificate; that respondent was enrolled and pursued his studies until April, 1919, when he asked the witness to help him fill out his graduation affidavit; this the latter did, and respondent filled it out, signed it, and swore to it before a notary, such affidavit being Exhib-

it 1, above mentioned; that in June of 1919 respondent graduated from the college.

The witness William P. Sachs testified in substance that he was deputy state superintendent of public instruction for the state of Missouri and examiner of applicants for certificates of preliminary education from 1916 to 1919; that in August of 1918 he filled out and signed a certificate, marked herein as Exhibit 3, and secured the signature of the state superintendent thereon, along with a batch of others; that he had never met or known respondent until the date of deposition in California; that he delivered the certificate, Exhibit 3, to Dr. Adcox and received a money fee therefor; that respondent did not take any examination for said certificate; that the dates of examination set forth therein as "August 27, 28, 29, 1915," he inserted so as to fit respondent's requirements, and the examination was thus dated back. Exhibit 3 is in form of an official certificate and certifies that Eugene John Rinaldo personally appeared before the superintendent and in a written examination on August 27, 28, 29, 1915, made passing grades in certain subjects therein listed. The witness Sachs further testified that the superintendent who signed the certificate entered that office for the first time in August, 1916, and served until January 1, 1919.

This evidence the board found sufficient to sustain the allegations of the complaint and adjudged respondent guilty as charged, and by order revoked his license. On the same record, on certiorari, the trial court adjudged the evidence insufficient to warrant the exercise of jurisdiction or to warrant the revocation of the license.

[2] Respondent did not appear at the hearing of October 18, 1932. He was, however, cited to appear at the time and place of such hearing and had reasonable notice thereof and opportunity to be heard. This was all that was necessary to confer jurisdiction of his person. *McGinn v. Board of Health*, 113 Cal. App. 228, 298 P. 118.

[3-5] The writ of certiorari can be used only for the purpose of ascertaining whether the trial court or board has exceeded its jurisdiction. The action of the inferior tribunal sought to be reviewed is final and conclusive upon every question except questions of jurisdiction. *Fickert v. Zemansky*, 176 Cal. 443, 168 P. 891. The writ cannot be used for the purpose of determining whether or not the evidence was sufficient to support the particular order or judgment complained of, provid-

ing the inferior tribunal had jurisdiction. Where the State Board of Medical Examiners is invested with jurisdiction to determine the guilt or innocence of one charged with an offense under the state Medical Practice Act (St. 1913, p. 722, as amended), as was the board in this case, by the filing of a complaint and by acquiring jurisdiction over the person of the accused, its determination on the question of guilt or innocence upon the evidence adduced at a hearing after due notice, whether based on sufficient evidence or not, is a determination arrived at in the exercise of its jurisdiction, and however erroneous it may be, it is not void for want of power in the board to render the decision. *Roberts v. Police Court*, 185 Cal. 65, 195 P. 1053. It is only where it is claimed and made to appear that there is a total lack of competent evidence upon which the adjudication could be based that an exception to the rule that the sufficiency of the evidence will not be reviewed is made, and review of the evidence may be had to determine the question whether jurisdictional facts were or were not proved. *Winning v. Board of Dental Examiners*, 114 Cal. App. 658, 300 P. 866. It cannot be said herein that there was no competent evidence upon which to base the judgment of the board. There was competent evidence tending to show that statements were made in his application by respondent as to his college work in St. Louis College of Physicians and Surgeons between September, 1904, and April, 1908, and as to his securing a diploma at that time, and as to his having fulfilled all the preliminary educational requirements of the Medical Practice Act of California, which were not true. This is not a trial upon the merits of the case presented to the board. Upon competent evidence the board made its determination. Neither the superior court nor this court can substitute its determination therefor. Under our law the decision thereon was final and conclusive. *Roberts v. Police Court*, supra; *Matter of Hughes*, 159 Cal. 360, 113 P. 684. Jurisdiction to determine the effect of evidence involves the power to draw erroneous conclusions from it. *Farm-*

ers, etc., Bank v. Board, 97 Cal. 318, 32 P. 312.

[6] We are not unmindful of the repeated declarations in decisions of our appellate courts that the rights of a person to practice a profession for which he has prepared himself is property of the very highest character, entitled to protection by such safeguards as the law has thrown about it. On the other hand, the power granted by the Legislature to the Board of Medical Examiners to revoke licenses previously issued to applicants is sustained upon the ground that the Legislature has authority under its general police power to provide all reasonable regulations that may be necessary affecting the public health, safety, or morals, and with this object in view to provide for dismissal from the medical profession of all persons whose principles, practices, and character render them unfit to remain in it. Among these provisions of law authorizing a removal or revocation is that of fraud or misrepresentations in procuring the license to practice. The very foundation of the property right hereinabove mentioned is preparation leading up to the qualifications essential to the safety of the public. To meet the exacting tests now generally required before one may follow the medical profession, one must devote years of arduous effort and closest application to acquire the requisite and necessary knowledge, skill and experience to warrant his license to practice. Any fraud or misrepresentation in the application on which such a license is granted, resulting in giving appearance of qualification to one who does not in fact possess it, is sufficient under the law to warrant revocation of such license. A review of the evidence adduced before the board in this case shows that the board had sufficient competent evidence before it to warrant the exercise of its power to revoke respondent's license. Its decision and order is therefore final and conclusive, and it was error for the trial court to annul the order of revocation.

The judgment is reversed.

We concur: STEPHENS, P. J.; CRAIL, J.

5 Cal.App.2d 32

**DRAPEAU, Building and Loan Commissioner,
v. SUPERIOR COURT IN AND FOR CITY
AND COUNTY OF SAN FRANCISCO et al.**
Civ. 9802.

District Court of Appeal, First District,
Division 1, California.

March 1, 1935.

Appeal and error ⇐82(1)

Superior court's order directing state commissioner liquidating building and loan association to obey order made in special proceeding under Building and Loan Act authorizing consummation of transaction involving realty on which association had trust deed held appealable as "special order made after final judgment," precluding certiorari (Code Civ. Proc. §§ 963, 1068).

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco.

Application by L. O. Drapeau, as State Building and Loan Commissioner in the liquidation of the Union Building & Loan Association, for a writ of certiorari to the superior court in and for the city and county of San Francisco, and another.

Application denied.

McKee, Tasheira & Wahrhaftig, of Oakland, for petitioner.

PER CURIAM.

Application for a writ of certiorari to review and annul an order made by the superior court directing the building and loan commissioner to comply with an order theretofore made by said court in a special proceeding instituted pursuant to the provisions of the so-called Building and Loan Act (St. 1931, p. 483) authorizing the consummation of a transaction relating to certain real property on which the Union Building & Loan Association, then and now in liquidation, held a deed of trust. Section 1068 of the Code of Civil Procedure provides that a writ of certiorari may be granted where a court "has exceeded the jurisdiction * * * and there is no appeal, nor * * * any plain, speedy, and adequate remedy"; and in conformity therewith it has been held that, even though it appear that a court be without jurisdiction to make an order or decree, certiorari will not lie to review the same if said order or decree is appealable; that the remedy is

by way of appeal. *Stoddard v. Superior Court*, 108 Cal. 303, 41 P. 278; *Stuttmeister v. Superior Court*, 71 Cal. 322, 12 P. 270; *Helbush v. Superior Court*, 99 Cal. App. 501, 278 P. 1062. In our opinion, the order which petitioner seeks to have annulled must be construed as a "special order made after final judgment," within the meaning of section 963 of the Code of Civil Procedure, and therefore appealable. Upon that ground the application is denied.



5 Cal.App.2d 267

VAUGHT et al. v. ROSS.
Civ. 8709.

District Court of Appeal, Second District,
Division 1, California.

March 15, 1935.

1. Replevin ⇐110

In action to recover personalty where judgment provided for entry of money judgment if defendant failed to return property within five days after notice of entry of judgment, defendant could not satisfy judgment by returning property twenty-nine days after notice.

2. Replevin ⇐110

Court, on motion to satisfy judgment which ordered entry of money judgment if defendant failed to return property within five days after notice of entry of judgment, could not order judgment satisfied notwithstanding appeal was pending from judgment and defendant had offered to return property twenty-nine days after entry of judgment, since effect of order would be an unauthorized modification of judgment and would require plaintiff to accept property in lieu of money judgment.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by C. W. Vaught and another, doing business under the name and style of Vaught Bros., against M. S. Ross. From an order denying defendant's motion to satisfy the judgment, defendant appeals.

Affirmed.

H. Y. Gibson and John L. Bisher, both of Los Angeles, for appellant.

Davis & Thorne and W. H. Brawner, both of Los Angeles, for respondents.

SHINN, Justice pro tem.

This is an appeal from an order denying a motion to satisfy a judgment.

Plaintiff recovered judgment May 13, 1932, for the possession of personal property consisting of a caterpillar tractor and a bulldozer and damages for its detention, the judgment providing that if possession was not delivered within five days after notice of entry of judgment, plaintiff should recover the value of the property in the amount of \$4,050.

Defendant had notice of entry of judgment, gave notice of intention to move for a new trial, dismissed that proceeding, and took an appeal from the judgment, which judgment, by order of dismissal of the appeal therefrom by the District Court of Appeal, has become final. Twenty-nine days after receiving notice of entry of judgment defendant offered to return the property and to pay the damages and costs, which offer was refused. On August 3, 1932, on notice, defendant presented a motion for an order satisfying the judgment, which was denied, and defendant took the present appeal. The motion was based upon the alleged offer to return the property and to pay the damages and costs.

The argument advanced for reversal of the order consists principally of criticism of the form of the judgment, which, it is said, should have awarded plaintiff possession or a money judgment in case recovery of the property could not be had; wherefore, it is argued that he was entitled to a reasonable time in which to return the property and, hence, his offer was timely. If the point is well taken, the court committed error, but that question was not involved on the motion and is not involved here.

[1, 2] At the expiration of five days after notice of entry of judgment, plaintiff held a judgment for \$4,050, the value of the property. Defendant sought to satisfy this judgment by offering to return the property, but the offer came too late. The parties were bound by the judgment and so was the court. The effect of an order satisfying the judgment would have been to vacate the judgment in so far as it awarded plaintiff money in lieu of the specific property and to compel plaintiff to accept the property instead. The result would have been an unauthorized modification of the judgment, for the power of the court to review or set aside its judgments, in whole or in part, is limited by statute. A mo-

tion to satisfy the judgment is not one of the modes provided for that purpose. Egan v. Egan, 90 Cal. 15, 27 P. 22; Dyerville Mfg. Co. v. Heller, 102 Cal. 615, 36 P. 928; 14 Cal. Jur. 999. The fact that an appeal from the judgment was pending does not alter the case. The appeal and stay bond given thereunder did not, of course, prevent the conversion of the judgment from one for possession of property into one for money, through the expiration of the five-day period specified therein. This provision was self-executing. The order appealed from was therefore correct, for as long as the judgment for money was in force, satisfaction could only be accomplished by strict compliance with its terms, regardless of error therein.

Other reasons are urged for affirmance of the order which it is unnecessary to discuss.

The order is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

Action by the American States Public Service Company against John C. Rath and another. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Prior opinion, 35 P.(2d) 145.

Albert Sidney Brown and Knight & Reynolds, all of Los Angeles, for appellant John C. Rath.

Melvin D. Wilson, Fletcher Dobyns, and Ralph E. Smith, all of Los Angeles, for defendant Frank Gillelen.

Paul Overton and W. C. Kennedy, both of Los Angeles, for respondent.

SHENK, Justice.

Appeal from a judgment for the plaintiff.

The plaintiff sued to recover sums alleged to have been retained by the defendants as secret profits in transactions in which it was alleged the defendants were the agents of the plaintiff. The complaint was in two counts. In the first count it was alleged that the defendants, as agents of the plaintiff, received the sum of \$675,000 for the purpose of purchasing the issued and outstanding stock of Southern California Utilities, Inc., for the plaintiff's account, and that in fact but \$500,000 was paid for said property; that the defendants retained the difference of \$175,000 for their own account, which sum was due and owing to the plaintiff and remained unpaid. In the second count the plaintiff alleged a conspiracy between the defendants Rath and Gillelen to defraud the plaintiff of said sum of \$175,000. The plaintiff prayed judgment for the sum of \$175,000.

Upon the trial it appeared that Rath came to Southern California in 1928 for the purpose of negotiating for the purchase of public utilities for his principal, the plaintiff. Rath met the defendant Gillelen, who introduced him to a Mr. Nicholson, the owner of Southern California Utilities, Inc. In the final negotiations for the purchase of the stock from Mr. Nicholson by the plaintiff, two transactions were consummated: An agreement between Gillelen and Rath that the latter's principal would pay \$650,000 for the utility, and a separate agreement between Gillelen and Nicholson that Nicholson would accept \$500,000 as the full purchase price. The plaintiff furnished the sum of \$650,000 as the purchase price, which was paid to Gillelen. Gillelen paid \$500,000 to Nicholson, and the plaintiff became the owner of the

2 Cal.2d 670

**AMERICAN STATES PUBLIC SERVICE
CO. v. RATH et al.
L. A. 13553.**

Supreme Court of California.

March 22, 1935.

1. Appeal and error ☞931(1)

On appeal, inferences and intendments are to be drawn which will support judgment.

2. Brokers ☞38(7)

In action to recover \$150,000 alleged to have been retained by defendants as secret profits in purchasing public utility for plaintiff, and \$25,000 paid to one of defendants as commission, amendment reducing amount sued for to \$150,000, on theory that plaintiff would be entitled to recover either \$150,000 or \$25,000, depending on whether one of defendants was agent of plaintiff or independent broker, but not both amounts, did not waive right to recover \$25,000 if jury found that \$150,000 was rightfully retained by such defendant.

3. Brokers ☞38(4)

In action to recover \$150,000 alleged to have been retained by defendants as secret profits in purchasing public utility for plaintiff and \$25,000 paid to one of defendants as commission, evidence *held* to support verdict for \$25,000 on theory that one of defendants was not plaintiff's agent, but was independent broker, and that defendants conspired to retain additional \$25,000 without right.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

utility. In addition, on Rath's representation that Gillelen was the "agent" in the transaction and at Rath's request, the plaintiff paid to Rath \$25,000 to be paid as a commission to Gillelen. The evidence amply supports the conclusion of the jury that that sum was retained by Rath and that evidence was manufactured by the defendants to create the appearance that the sum was paid to Gillelen.

Upon disclosure of the facts at the trial, it was questioned whether the plaintiff would be entitled to recover both sums; i. e., the sum of \$150,000 "secret profit," and the sum of \$25,000 commission. It was argued that, if Gillelen was an independent broker in the transaction and made a profit, he was entitled to retain it, in which event the plaintiff could recover only the sum of \$25,000 paid as a "commission"; but, if Gillelen was in fact an agent, he would be entitled to retain only the \$25,000 commission, and the plaintiff should recover the larger sum of \$150,000. Accordingly, the plaintiff was granted permission to amend the complaint "to conform to the proof" by substituting for the figures \$175,000, wherever they appeared in the complaint, the sum of \$150,000. The jury returned a verdict for the plaintiff against both defendants for the sum of \$25,000. The defendant Rath alone appealed.

[1-3] The main ground of the appeal is that the verdict is not responsive to the issues, and that, pursuant to the principles enunciated in *Muller v. Jewell*, 66 Cal. 216, 5 P. 84; *Driscoll v. Cable Railway Co.*, 97 Cal. 553, 32 P. 591, 33 Am. St. Rep. 203; *Gundry v. Atchison, T. & S. F. Ry. Co.*, 104 Cal. App. 753, 764, 286 P. 718, and similar cases, the only verdict possible under the issues framed by the pleadings was a verdict for the plaintiff for \$150,000. The cases cited govern to the extent that, if the only sum which the plaintiff could recover under the issues and the proof was the sum of \$150,000, then the jury by its verdict of \$25,000 sought merely to equalize the financial conditions and the defendant would be entitled to a reversal. But that is not the state of the record before us. If possible, the inferences and intentions are to be drawn which will support the judgment. It is a fair inference from the record that the amendment of the complaint served merely to reduce the figures to the highest possible sum which under the proof the plaintiff could recover, and that the plaintiff did not waive any right to recover the smaller sum of \$25,000 if the jury

should find that the greater sum of \$150,000 was rightfully retained by the defendant Gillelen. Evidence was introduced on both theories, and the evidence supports the verdict on the alternate theory that the defendant Gillelen was not the agent of the plaintiff, but was an independent broker, and that the defendants conspired to retain the additional sum of \$25,000 without right. The appellant concedes that, if that issue was left in the case, the decisions relied upon do not apply.

We conclude that the verdict was responsive to the issues. There was no error in the rulings of the trial court.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.



2 Cal.2d 652

In re SMITH'S ESTATE.

Sac. 4875.

Supreme Court of California.

March 22, 1935.

Rehearing Denied April 18, 1935.

1. Bastards ⇐102, 104

Statute providing that illegitimate child does not represent his mother by inheriting any part of estate of her lineal or collateral kindred is applicable only to legitimate kindred of mother, and does not prevent one illegitimate child from inheriting estate of another illegitimate child (Civ. Code, § 1387).

2. Bastards ⇐102, 104

Statute providing that estate of illegitimate child was succeeded to as if child had been born in lawful wedlock and had survived father and those related to him through father did not affect rights of illegitimates between themselves or prevent them from inheriting from each other through their mother (Civ. Code, § 1388).

3. Bastards ⇐102, 104

Under statute providing that estate of illegitimate child should be succeeded to as if child was born in lawful wedlock, estate of illegitimate son who died intestate leaving no issue, wife, mother, or other lineal or collateral relatives, save for an illegitimate broth-

er and a maternal aunt, was succeeded to by illegitimate brother, notwithstanding statute providing that illegitimate child could not represent his mother by inheriting any part of estate of her lineal or collateral kindred, since such statute was applicable only to legitimate kindred of mother (Civ. Code, §§ 1386-1388).

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Petitions by Arthur Smith, Christina Smith, and another in the matter of the estate of Lewis Smith, deceased, opposed by Herman A. Koch, administrator of the estate of Margaret Isabella Leys, deceased, distributee. From a decree of final distribution, petitioners appeal.

Reversed, with directions.

Irving D. Gibson, of Sacramento, and Cushing & Cushing and Everett S. Layman, all of San Francisco, for appellant Arthur Smith.

Frank L. Murphy, of Sacramento, for appellant Christina Ann Smith.

W. A. Green, of Sacramento, for respondent.

PRESTON, Justice.

This appeal is from the decree of final distribution in the estate of Lewis Smith, who died intestate in Sacramento county on the 6th day of January, 1927. We are concerned with the law of succession as of said date. A proper construction of certain provisions of sections 1386, 1387, and 1388 of the Civil Code, as they then read, will determine the course of the appeal.

The decedent and this appellant, Arthur Smith, were illegitimate sons of Sophia Smith, who was never married. Neither of the illegitimates was ever legitimated or adopted by his father. The decedent left no issue, wife, mother, or other relative, lineal or collateral, save appellant and a maternal aunt, a sister of his mother. She, however, has since died, and her personal representative is the respondent on this appeal. The court below awarded the entire inheritance to her estate, excluding in toto the claim of appellant—the illegitimate brother of decedent. We are constrained to hold that appellant, and not respondent, is entitled to the estate.

Appellant contends that his right to inherit is measured by the provisions of section 1386 of the Civil Code, subd. 3, which read in part: "When any person having title to any estate * * * dies without disposing thereof by will, it is succeeded to and must be distrib-

uted, unless otherwise expressly provided in this code and the Code of Civil Procedure * * * in the following manner: * * * 3. If there is neither issue, husband, wife, father, nor mother then in equal shares to the brothers and sisters of decedent. * * *

Respondent, on behalf of the maternal aunt, contends that former section 1388 of said Code makes applicable subdivision 5 of said section 1386 thereof, which, so far as here material, reads: "If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree. * * *" From section 1388, as amended in 1921 (St. 1921, p. 194), we find the provision relied upon to read: "The estate of an illegitimate child * * * is succeeded to as if he had been born in lawful wedlock and had survived his father and all persons related to him only through his father."

This language, however, is to be construed in the light of kindred provisions found in section 1387, which may be epitomized as follows: "Every illegitimate child is an heir of * * * his mother; and inherits * * * her estate * * * in the same manner as if he had been born in lawful wedlock; but he does not represent his * * * mother by inheriting any part of the estate of * * * her kindred, either lineal or collateral. * * *"

Now respondent asserts that the aunt inherits because she is the nearest in collateral line to decedent, through his mother, and that appellant, as an illegitimate, as well as the father's line of kindred are excluded. As a corollary, the further conclusion is drawn that the above-quoted language of section 1388 legitimated the decedent, and under the provisions of section 1387 appellant may not represent his mother in claiming the inheritance.

It is true that many of the common-law disabilities of an illegitimate are retained, but greater liberality toward this class is in evidence in the statutes of other jurisdictions and in the trend of judicial interpretation of them. Moreover, it has from our earliest history been the policy of the law to treat illegitimates as legitimates among themselves. 3 R. C. L. pp. 777, 778, § 57; 7 C. J. pp. 962, 963, § 48.

Now when, prior to the amendment of 1921 (St. 1921, p. 194), section 1388 provided: "The estate of an illegitimate child * * * goes to his lawful issue, or, if he leaves no issue, to his mother, or in case of her decease, to her heirs at law," the law was clear that ap-

pellant would inherit the whole of the estate of his brother to the exclusion of the aunt. Estate of Magee, 83 Cal. 414; Estate of DeCigaran, 150 Cal. 682, 89 P. 833. The question is: When the 1921 amendment was enacted, was its purpose to increase or to decrease the inheritable blood of the illegitimate?

[1, 2] While it may have enlarged the inheritable rights of the mother's lineal and collateral kin, we see no evidence of an intent to curtail the rights of illegitimates between themselves, nor their power to inherit from each other through their mother. The effect of the amendment, standing alone, would be to give appellant a preferential right over respondent, for the relationship between his mother and himself is reciprocally legitimate and entitles him to represent her. But section 1387 has always prevented the illegitimate from representing his mother in inheriting the estate of her kindred, lineal or collateral. However, this proviso is without application to appellant, as it has twice been construed by this court to refer to legitimate kindred. Estate of Magee, *supra*; Estate of DeCigaran, *supra*. Construing a statute which reads identically as does ours, the Oklahoma Supreme Court approved this holding. *Bahnsen v. Burl*, 95 Okl. 191, 218 P. 846.

[3] If this restriction applies only to legitimate kindred, the inference seems logical that appellant may represent his mother as to her kindred who are illegitimate and through her assert his claim to the estate of decedent. This conclusion seems to be in harmony with a long line of decisions in other jurisdictions. For example, Alabama (Code 1923, § 7371), Rhode Island (Gen. Laws 1923, c. 367, § 7), Texas (Rev. St. 1925, art. 2582), Vermont (G. L. 3418), Virginia (Code 1919, § 5268), and perhaps other states have allowed illegitimates to inherit from each other under statutes which provide substantially that "bastards shall also be capable of inheriting or of transmitting inheritance on the part of the mother in like manner as if they had been born in lawful wedlock." Under this type of statute, the right of one illegitimate to inherit from another is conceded in the states above mentioned. See notes, 16 Ann. Cas. p. 987; 24 A. L. R. 570, 583; 83 A. L. R. 1330, 1334. Except for the restrictions found in section 1387 which are inapplicable to the present situation, the meaning of our statutes, construed together, and the one above mentioned, is the same. By said statute of descent as amended in 1921 (section 1388), the decedent remained

an illegitimate as to appellant. *Wolf v. Gall*, 32 Cal. App. 286, 163 P. 346, 350.

It is unnecessary to decide whether section 1386 of the Civil Code, standing alone, in the absence of sections 1387 and 1388, would dispose of the estate of an illegitimate. It is enough to hold that by reference the sections are complementary to each other.

The judgment is reversed, with directions to enter a new decree consistent with the above holding.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.



2 Cal.2d 673

PEOPLE v. GARCIA.
Cr. 3775.

Supreme Court of California.

March 22, 1935.

Rehearing Denied April 18, 1935.

1. Homicide ⚔250

Evidence held sufficient to support conviction of murder.

2. Homicide ⚔332(3)

Supreme Court cannot interfere with jury's implied finding on conflicting evidence that homicide committed by defendant, convicted of murder, constituted unprovoked and premeditated killing which amounted to first-degree murder warranting imposition of death penalty.

3. Homicide ⚔230

Intent to kill may be inferred from circumstances of unlawful act resulting in killing.

4. Homicide ⚔145

Malicious and guilty intent is presumed from deliberate commission of unlawful act for purpose of injuring another.

5. Criminal law ⚔556

Prosecution is not bound by accused's exculpatory statements or self-serving declarations in confession, when shown by direct or circumstantial evidence to be untrue.

6. Criminal law ⚔538(3)

Confession must be weighed in same manner as other evidence by jury, which may believe part and reject remainder thereof.

7. Criminal law ⚡321

Court, trying murder case, properly presumed that witness, called to establish killing at preliminary hearing, record of which positively declared that witness was "duly sworn," assented to oath, and that magistrate performed his duty in administering it.

8. Criminal law ⚡636(3)

Hearing and disposition of motion for separate trials on different counts of information being preliminary or formal matters, not affecting defendant's guilt or innocence, his presence at such hearing is not indispensable.

9. Criminal law ⚡618

Denial of motion for separate trials under two counts of information, charging state prison inmate with murder of two fellow prisoners on same day within short interval and apparently with same knife, *held* not abuse of trial court's discretion, especially in view of evidence that homicides were culmination of defendant's plan to "get" victims before they "got" him (Pen. Code, § 954).

10. Homicide ⚡163(2)

Evidence in trial of state prison inmate for murder of fellow prisoner that prison physician administered sedatives and bromides to deceased in treating him for epilepsy *held* properly rejected as immaterial on question of deceased's reputation for peace and quiet, though possibly tending to establish that he was irritable and dangerous, as defendant urged in support of contention that homicide was committed in necessary self-defense.

11. Witnesses ⚡37(4)

State prison warden's testimony in inmate's trial for murder of fellow prisoner as to latter's prison conduct, as disclosed by prison record, *held* properly rejected as not tending to establish his reputation for peace and quiet.

12. Criminal law ⚡662(1)

Refusal of defendant's request to transpose courtroom furniture, so as to remove obstruction to his full view of witnesses by clerk's desk, *held* not prejudicial to him as denying him right to be confronted with witnesses against him.

13. Criminal law ⚡633(1)

Proper conduct of trial rests in trial court's sound discretion.

14. Criminal law ⚡649(2)

Trial court's denial of defendant's request for continuance of trial until following morning because of certain witness' absence after ascertaining that defendant had other witnesses available and ready to testify *held* not abuse of discretion.

15. Homicide ⚡14(2)

There need be no appreciable time between formation of intention to kill and act of killing to warrant conviction of murder, but such intention and act may be as instantaneous as successive thoughts of mind.

16. Criminal law ⚡763, 764(10)

Instruction that proof of moving cause of crime is permissible, but never essential, that motive therefor is unimportant, but may be shown by positive evidence or facts and surroundings of act, and that motive is mere circumstance to be considered by jury, but that absence thereof is circumstance in accused's favor, *held* not erroneous as charge on weight of evidence or facts (Const. art. 6, § 19).

17. Criminal law ⚡829(3)

Refusal of defendant's tendered instruction on motive in murder trial *held* not error, in view of given instruction, sufficiently covering subject and fully safeguarding defendant's rights when read with court's entire charge.

18. Criminal law ⚡829(1)

Refusal of instructions, not essential to clarify given instructions and treating of subject sufficiently and correctly covered in other portions of court's charge, was not error.

19. Criminal law ⚡730(3)

Trial court need not admonish jury to disregard district attorney's improper remarks in cross-examination of witnesses every time it sustains objection to question asked by such attorney.

20. Criminal law ⚡730(3)

District attorney's misconduct in cross-examination of defense witnesses *held* not prejudicial to defendant, in view of court's charge to disregard rumors, matters, and facts referred to or stated by counsel, but stricken out by court, and every impression or idea suggested by counsel's questions, to which objections were sustained, and try defendant only on evidence before jury.

21. Homicide ⚡319

Defendant's motion for new trial after conviction of murdering fellow prisoner on ground of newly discovered evidence, supported by affidavit of another prisoner, subpoenaed by defendant and present in court during trial, but not called as witness, *held* properly denied for want of diligence.

22. Homicide ⚡319

Alleged newly discovered evidence that prison inmate saw fellow prisoner, for murder of whom third prisoner was convicted, discard knife immediately after fatal stabbing, *held* not ground for new trial, where several witnesses testified at trial that de-

ceased possessed and wielded knife at time of homicide and discarded it immediately thereafter; new evidence being largely cumulative.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Harry Garcia was convicted of murder, and he appeals.

Affirmed.

Thomas O'Hara and W. L. Shaw, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

On October 7, 1933, the defendant, while an inmate of Folsom prison, stabbed and killed two fellow prisoners. The district attorney of Sacramento county filed an information containing two counts, each charging defendant with murder. He was tried and convicted as charged. In the absence of a recommendation in either verdict of the jury, the court, as required by law, entered judgment imposing the death penalty for each offense. This appeal is from the judgment and order denying a new trial.

[1] There is no merit in the defendant's contention that the evidence is insufficient to support either verdict. The record discloses that for some time prior to the two homicides, which occurred within a few minutes of each other, there had been ill will between the defendant and each of his victims. Upon occasions prior to the homicides, this ill will flared into physical combat, with the result that the combatants either suffered bruises or stab wounds. Much conflict exists in the evidence as to the cause of these prior encounters and as to which person was the aggressor. We mention the pre-existing "bad blood" between the defendant and his respective victims as offering some explanation for the homicides of which defendant now stands convicted. The same sharp conflict in the evidence as to the prior encounters exists with respect to the circumstances of the homicides. In support of its theory that the killings were deliberate, premeditated, and unprovoked, the prosecution offered the testimony of three inmates of the prison, each of whom testified, in substance, that at approximately 11:30, or shortly thereafter, on the morning of the homicides, the deceased Juan Garcia was walking across the prison yard alone; that the defendant approached him, took him by the arm,

whirled him around and plunged a long-bladed knife into his chest. These witnesses also testified that the decedent was unarmed and did not make an assault upon defendant at the time.

The prosecution thereupon produced five other inmates of the prison who testified that at about 12 o'clock on the same day the defendant approached the deceased Stanley C. Price who, at the time, was sitting on a bench in the prison yard; that the defendant uttered an ugly epithet and plunged a long-bladed knife into the chest of Price before he had a chance to rise from his sitting position; that the defendant withdrew the knife from the body of Price, wiped it off and walked away; that Price was unarmed at the time of the stabbing and was engaged in eating a sandwich, both of his hands being occupied.

The prison physician testified that each deceased died as a result of stab wounds.

[2] A confession made by the defendant two days after the homicide in the presence of the district attorney, the warden, and other prison officials was put in evidence through the testimony of the person who had reported the same. In this statement the defendant, after narrating the prior troubles he had experienced with each of his victims, went on to relate that he had stabbed Garcia as he was walking across the prison yard and Price as he was sitting on a bench, adding that he was "in fear that they were going to kill me." He disclaimed in his confession any intention to kill either man, stating that he merely desired by the stabbings to cause his victims "to get that out of their heads that they meant to kill me."

In his defense the defendant called as witnesses more than fifteen inmates of the prison whose testimony, collectively, related the circumstances of the earlier combats between defendant and his victims in a light more favorable to defendant than that disclosed by the prosecution's evidence, and described the happenings of the day of the homicides in a way that tended to indicate that each of defendant's victims had commenced the fatal frays by respectively attacking defendant with a knife, the latter retaliating in each instance as a matter of self-defense. The defendant took the stand in his own behalf and related in detail the several encounters he had with his victims, stressing that on the day of the homicides he was assaulted by them when each possessed a knife and that he stabbed each of them in self-defense. He also testified that his confession was involuntary and was extracted from him by means

of intimidation and physical force exerted upon him by certain prison officials.

The prosecution thereupon produced evidence tending to rebut much of the defense testimony. Witnesses were called who testified to the free and voluntary character of the defendant's confession, to the fact that defendant was the aggressor in each instance on the day of the homicide and in his earlier encounters with each deceased, and to the fact that several of the defense witnesses, when interrogated by prison officials shortly after the homicides, disclaimed having any knowledge of the immediate events surrounding the perpetration of the homicides.

In view of this sharp conflict in the evidence we cannot, under well-settled principles, interfere with the jury's implied finding that each homicide constituted an unprovoked and premeditated killing which under the law, as expounded in the trial court's instructions, amounted to murder in the first degree, warranting the imposition of the death penalty.

[3-6] In so concluding we are mindful that defendant in the confession introduced in evidence by the prosecution stated that he did not intend to kill either victim of his murderous assaults. Intent may be inferred from the circumstances of the unlawful act. *People v. Bennett*, 161 Cal. 214, 218, 118 P. 710. The law conclusively presumes a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another. *People v. Zari*, 54 Cal. App. 133, 136, 201 P. 345. The prosecution is not bound by the exculpatory statements or self-serving declarations in a confession when shown by direct or circumstantial evidence to be untrue. *People v. Williams*, 142 Wash. 673, 253 P. 1074; *State v. Richardson* [Iowa] 240 N. W. 695, 700. In the present case, the prosecution produced evidence of eyewitnesses to the homicides, as well as other and inconsistent statements of the defendant, tending to establish that the homicides were without provocation and committed under circumstances showing an abandoned and malignant heart. Moreover, confessions stand upon the same footing as other evidence and are to be weighed by the jury in the same manner. All parts are not necessarily entitled to the same credit, and the jury may believe a part and reject the remainder of a confession. *People v. Wyman*, 15 Cal. 70, 74; 8 Cal. Jur. 119, § 207.

[7] Defendant makes the contention that it was error for the court below to deny his motion to vacate count one of the information

charging the unlawful and felonious killing of Juan Garcia. In support of his motion the defendant urged that he was not legally committed on this count, inasmuch as the transcript of the proceedings had at the preliminary hearing fails to disclose that the witness called to establish the Garcia killing had assented to the oath required of witnesses. We cannot agree with the defendant's contention. The record of these proceedings discloses:

"(Mr. Elmer Burrell, Folsom State Prison Convict, was then called and sworn as a witness on behalf of the People herein). Magistrate: * * * Raise your right hand. You solemnly swear your testimony in this case will be the truth, the whole truth and nothing but the truth, so help you God? Take a seat.

"Testimony of Elmer Burrell, witness produced on behalf of the People herein, who, after being first duly sworn by the Magistrate, as above stated, testifies as follows, to-wit. * * *

In view of the positive declaration in the record of the proceedings had at the preliminary hearing that the witness was "duly sworn," the trial court in denying the motion properly declared that "the court will presume there was an assent, and that the Magistrate performed his duty * * * in administering the oath, and the assent of the witness." The record does not contradict the statement therein that the witness was "duly sworn," it is merely silent as to the character of the assent.

[8] It was stipulated by respective counsel that the court below might hear a motion for separate trials in the absence of the defendant. This was done and the motion was denied. The hearing of this motion in defendant's absence is now urged as reversible error. In his opening brief the defendant declares that the cases do not state a definite rule as to the matters that may be considered in the absence of a defendant, and concludes that "apparently if the matter relates to a mere matter of law, when no matters affecting guilt or innocence of the defendant are presented, it may be heard in the absence of the defendant." In *Mooney v. Superior Court*, 130 Cal. App. 521, 20 P.(2d) 106, 107, it is declared: "It is the general rule that a defendant in a felony case should be present when he is arraigned and at every subsequent stage of the trial. * * * His presence, however, is not necessary at proceedings which are merely preliminary or formal and no matters affecting his guilt or innocence are presented." The hearing and disposition of a

motion for separate trials are preliminary and formal matters not affecting the guilt or innocence of a defendant. His presence is not, therefore, indispensable.

[9] It is next urged that it was error for the court below to deny the motion for separate trials. Section 954 of the Penal Code provides that: "An indictment, information, or complaint may charge * * * two or more different offenses of the same class of crimes or offenses, under separate counts. * * * The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information; * * * provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately. * * *" This section furnishes ample authority for the joint trial of the offenses of which defendant stands convicted. They were offenses of the "same class," as therein required, and were committed by defendant on the same day, within a short distance and interval of each other, and apparently with the same deadly weapon. Moreover, the evidence when considered in its entirety suggests that the two homicides were the culmination of a plan on defendant's part to "get" his two victims before they "got" him. In upholding an order refusing separate trials, this court declared in *People v. Kelly*, 203 Cal. 128, 135, 263 P. 226, 229, that: "The indictment showed that the three murders were committed by the same person, on the same day, and in the same city and county. These facts alone justified the court in forbearing, at the inception of the trial, to compel an election by the prosecution. When the evidence was concluded, the wisdom of the court's ruling was manifest." This reasoning is here applicable. We perceive no abuse of discretion in the trial court's ruling in the instant case.

[10] We find nothing prejudicial in the lower court's ruling precluding the defendant from showing the character of treatment for epilepsy being administered by the prison physician to the deceased Garcia. The physician did testify, in answer to questions by the defense, that the victim had been under his care for epilepsy. While the rejected evidence having to do with the administering of sedatives and bromides to the patient might tend to establish that he was, in fact, irritable and even dangerous, as urged by defendant, it would not necessarily prove his reputation for peace and quiet. The court below correctly indicated to the defendant that he

might show, by proper evidence, the reputation of the deceased for peace and quiet in order, of course, to assist the jury in determining whether the homicides were, as urged, committed in necessary self-defense. The proffered evidence went far afield, was immaterial, and properly rejected. *People v. Anderson*, 39 Cal. 703.

[11] There was no error in rejecting that portion of the warden's testimony having to do with the prison record or conduct of the deceased Garcia. While the warden expressed some difficulty in distinguishing between the victim's prison conduct and his reputation for peace and quiet, he stated that he was unfamiliar with the latter. The warden, as shown by his testimony, was merely familiar with the deceased's prison conduct as disclosed by the prison record. Obviously, a person's prison record or conduct may be bad by reason of various infractions of the rules not having any connection with matters tending to establish his reputation for peace and quiet.

[12] It is urged that the trial court erred in refusing defendant the right to be confronted with the witnesses against him. During the early part of the trial, it appears, the desk of the clerk of the court was between defendant and the witness chair and apparently in some manner obstructed defendant's full view of the witnesses. His request that the matter be adjusted and the courtroom furniture transposed was refused. No prejudice resulted to the defendant. He was at all times in the courtroom wherein the witnesses testified, and no complaint was or is made that he was unable to hear any portion of the evidence adduced. After some of the witnesses had been called, the district attorney adjusted the matter by exchanging seats with the defendant. The cases relied on by defendant under the assignment have to do with the improper introduction of transcripts of prior testimony of alleged absent witnesses. The cases are not in point.

[13, 14] During the course of the trial defendant asked for a continuance until the following morning on the ground that a certain witness subpoenaed by the defense was not present in court. The court, upon inquiry, ascertained that the defendant had other witnesses available and ready to testify and directed that the trial proceed. The proper conduct of the trial was a matter resting in the sound discretion of the court below. We find no abuse therein. The contention is utterly lacking in merit.

Defendant urges that the trial court erred in admitting certain rebuttal evidence. He makes four such assignments. We do not purpose to discuss them separately, but will dispose of the same by stating that an examination of the entire record discloses that the evidence objected to under this assignment tended in each and every instance to directly rebut and disprove some portion of the defendant's case. The rulings are free of error.

Under his next contention the defendant specifies thirty-six instances of alleged error on the part of the trial court in admitting and rejecting other evidence. We have examined these assignments in detail, and conclude, with a thorough knowledge of the entire record, that nothing even approximating prejudicial error in the trial court's rulings has been discovered or called to our attention.

[15] The giving and refusing of certain instructions are next complained of. Objection is first made to a portion of one of the instructions given at the request of the prosecution, to the effect that "there need be, however, no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind." As to the propriety of this portion of the instruction we entertain no doubt. *People v. Bennett*, supra, 161 Cal. 214, 218, 118 P. 710; *People v. Hunt*, 59 Cal. 430, 435.

[16] The following instruction was given by the court: "In criminal cases, the proof of the moving cause is permissible, and oftentimes valuable, but it is never essential. Where the perpetration of a crime has been brought home to a defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt and completing proof which might otherwise be unsatisfactory, and that motive may be shown by positive evidence or gleaned from the facts and surroundings of the act; then proof of the motive becomes a circumstance, but nothing more than a circumstance, to be considered by the jury, and its absence is equally a circumstance in favor of the accused, to be given such weight as the jury deems proper. But proof of motive is never indispensable." This instruction was taken almost verbatim from *People v. Durrant*, 116 Cal. 179, 208, 48 P. 75. It does not, as urged, constitute a charge on the weight of the evidence or on the facts of the case in violation of article 6, section 19, of the Constitution. This argument was refuted in *People v. Wilson*, 26 Cal. App. 336, 338, 339, 146

P. 1048, 1050, wherein, in discussing a similar instruction and an identical objection thereto, it is declared: "We think that the instruction is not subject to such objection. It did not in any manner indicate to the jury any opinion of the judge as to whether a motive for the alleged crime had or had not been shown, but it did fairly define the purposes for which evidence having reference to a possible motive had been received and should be considered."

[17] We find no error in the court's refusal to give a further instruction on motive tendered by the defendant. The subject was sufficiently covered in the foregoing instruction which, when read with the court's entire charge to the jury, fully safeguarded defendant's rights.

[18] Two other instructions requested by defendant and refused by the court need not here be set forth. They were not essential to clarify given instructions and the subjects treated therein were sufficiently and correctly covered in other portions of the court's charge. The jury was fully and fairly instructed on all phases of the law pertinent to the cause pending before it.

[19, 20] Complaint is made that the district attorney in four instances was guilty of prejudicial misconduct in his cross-examination of certain defense witnesses. In two of these instances the trial court properly overruled defendant's objections to the questions propounded by the district attorney. The matters sought to be elicited were clearly within the confines of proper cross-examination. As to the remaining two instances, the court sustained defendant's objections to the questions put to the witnesses and in one case admonished the jury, as requested by defendant, to disregard the remarks of the district attorney. It is not essential that the court so admonish the jury every time it sustains an objection to a question. However, in its charge to the jury the court adequately covered the situation when it declared that "if any matters have been referred to or stated during the trial of the case by counsel, which facts or matters were stricken out by the court * * * all such rumors, matters and facts should be entirely disregarded." The jury was also instructed to "disregard and discard from your minds every impression or idea suggested by questions asked by counsel * * * to which objections were sustained" and to try the defendant "only on the evidence which is before you." No miscarriage of justice appears to have resulted from the conduct here complained of.

[21, 22] Nor do we find any abuse of discretion in the trial court's denial of the defendant's motion for new trial. The motion was grounded on alleged newly discovered evidence and was supported by an affidavit of one of the inmates of the prison to the effect that the affiant saw the deceased Garcia discard a knife immediately after the fatal stabbing; that the affiant retrieved the knife and concealed it upon his person until the prison officials took it from him; and "that he has feared to inform the defense * * * of his knowledge of the affray aforesaid for fear of the consequences to himself on the part of the prison authorities. * * *" It was established by the district attorney that the affiant had been subpoenaed by the defendant and had been present in court during the course of the trial, but had not been called as a witness. In view of this the court below declared that since the defendant "had the witness here and had the opportunity to discuss it with him, the court is bound to come to the conclusion you did not exercise the diligence that you should have exercised." In addition, it should again be pointed out that several defense witnesses testified that the deceased Garcia possessed and wielded a knife at the time of the homicide which he discarded immediately thereafter. The alleged newly discovered evidence was, therefore, largely cumulative.

The judgment and order denying a new trial are, and each is, affirmed.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.



2 Cal.2d 630

KNOKE v. SWAN.

L. A. 12955.

Supreme Court of California.

March 21, 1935.

1. Courts ⇨90(1)

Supreme Court *held* bound by prior decisions that maxim de minimis is inapplicable to tax sales, and that such sales are unauthorized unless conducted in strict accordance with statute.

2. Taxation ⇨665

Tax sale of land for two cents less than legal amount of taxes, penalties, and costs due *held* invalid.

3. Adverse possession ⇨45

Plaintiff's possession being interrupted by filing action to quiet title before expiration of statutory period, claim of title by adverse possession could not be maintained.

In Bank.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by A. H. Knoke against Emma L. Swan. Judgment for plaintiff, and defendant appeals.

Reversed.

For prior opinion, see 35 P.(2d) 327.

Elliott H. Barrett, and Charles J. Kelly, both of Los Angeles, for appellant.

McKenna & McKenna, Catherine A. McKenna, and J. Irving McKenna, all of Los Angeles, for respondent.

PER CURIAM.

This is an action to quiet title to a lot in the city of San Francisco. Defendant is the record owner of the property. Plaintiff's chief claim of title is through a tax deed. The record shows, however, that the land was sold for two cents less than the legal amount of taxes, penalties, and costs due at the time of sale. The question is whether this error renders the sale invalid.

[1, 2] Were this point newly presented, we should hesitate to declare void a title founded on proceedings where the error was so small. However, it has been several times decided in this state that the maxim, "De minimis non curat lex," does not apply to tax sales, which are deemed unauthorized unless conducted in strict accordance with the statute. Such has been the holding of our cases where the sum was for an amount greater than that actually due. *Hotchkiss v. Hansberger*, 15 Cal. App. 603, 115 P. 957; *Warden v. Broome*, 9 Cal. App. 172, 98 P. 252; *Miller v. Williams*, 135 Cal. 183, 67 P. 788; *Hall v. Park Bank*, 165 Cal. 356, 132 P. 452. And the same conclusion has been reached where the amount was less than that due, unless the discrepancy was only a fraction of a cent. *Jordan v. Beale*, 172 Cal. 226, 155 P. 990; *Chapman v. Jocelyn*, 182 Cal. 294, 187 P. 962; see *Gottstein v. Kelly*, 206 Cal. 742, 276 P. 347. The cases in other jurisdictions are in conflict,

but we are bound by the above decisions, and accordingly conclude that plaintiff has failed to establish a good title based on the tax sale.

[3] Plaintiff also makes a claim of title by adverse possession, but the record shows that the possession was interrupted by the filing of the action before the statutory period had elapsed, and this, of course, removes the basis of such a claim. *Estate of Richards*, 154 Cal. 478, 98 P. 528; *Myran v. Smith*, 117 Cal. App. 355, 4 P.(2d) 219.

The judgment is reversed.



2 Cal.2d 638

FESSIER v. CEMPBELL et al.

Sac. 4872.

Supreme Court of California.

March 21, 1935.

Rehearing Denied April 18, 1935.

1. Municipal corporations Ⓒ871

Provision in city charter for pension and relief funds for city employees is not violative of constitutional prohibition against gifts of public money (St. 1923, p. 1347, art. 5, subd. 58; Const. art. 4, § 31).

2. Municipal corporations Ⓒ220(9)

Provision of charter authorizing city to provide pension and relief funds for city employees did not give city right to provide for death benefit, part of cost of which was to be borne by city (St. 1923, p. 1347, art. 5, subd. 58; St. 1929, p. 420, § 9 (c) (1, 2)).

3. Municipal corporations Ⓒ220(9)

Power conferred on city by provision of freeholders' charter to provide pension and relief funds for city employees held not to include by implication power to devote pension and relief funds to payment of premiums on contract of insurance by which insurer and not city would discharge city's obligation to disburse pension and relief funds (St. 1923, p. 1347, art. 5, subd. 58).

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by E. N. Fessier against J. P. Campbell and others. From a judgment for the defendants, the plaintiff appeals.

Reversed.

Chester E. Watson, Berry & Watson, and F. C. Cloudsley, all of Stockton, for appellant.

Decoto & St. Sure, of Oakland, amici curiæ for California State Firemen's Ass'n, Heath Club of Oakland, Red Bluff Fire Department, International Ass'n of Fire Fighters, Local No. 55, Oakland, Cal.

J. Harold Weise, of San Francisco, amicus curiæ for members of San Francisco Fire Department.

Shelley J. Higgins, of San Diego, Raymond G. Thompson, of Pasadena, Mason & Windham, of Long Beach, and Ignatius F. Parker, of Los Angeles, amici curiæ for Pasadena Fire & Police Improvement League, San Diego County Federated Trades & Labor Council, Members of San Diego Fire Department, California State Firemen's Ass'n, Women's Auxiliary, C. S. F. A., Los Angeles Fire & Police Protective League, Members Alhambra Fire Department, Long Beach Firemen's Mutual Benefit Ass'n.

J. Leroy Johnson, of Stockton, for respondents.

PER CURIAM.

The plaintiff, a resident taxpayer of the city of Stockton, brought this action to enjoin the defendant officers of the city from issuing to the Equitable Life Assurance Society of the United States a warrant in the sum of \$47,-\$98.18 in payment of the first annual premium on a contract of group police and firemen's disability, pension, and life insurance proposed to be undertaken by the city, and from paying such sum for the purpose stated. The case was heard upon a written stipulation of facts. Judgment went for the defendants. However, the trial court continued in force, pending appeal, a temporary restraining order theretofore issued. The plaintiff appealed from the judgment.

The city of Stockton is governed by a freeholders' charter, adopted in 1923 (St. 1923, p. 1321). By subdivision 53 of article 5 of the charter power is given "to provide a pension and relief fund for policemen and firemen and other officers and employees of the city." On July 14, 1932, the city council adopted Ordinance No. 1278, and subsequently amending ordinances, creating a pension board and providing for certain pension and relief benefits for disabled and retired members of the police and fire departments of the city, to be administered by the pension board. Briefly, the ordinance designates the retirement age of the members, the monthly retirement income to

be received, and the method of its computation, but not to exceed \$125 per month, the payment of a benefit during physical or mental disability caused by the discharge of departmental duties, and death benefits of \$5,000 upon natural death and \$5,000 additional in the event of accidental death, if the member die before retirement, and \$1,000 if death occur after retirement, and, in addition, the unpaid sums deposited by the member to the pension fund without interest. Contributions are provided by the member to the pension fund based on the member's salary, and, in addition, the sum of \$1 monthly, or more as may be required, to the death benefit fund. The ordinance contemplates that death benefits shall be paid for by the members' contributions, either directly or applied toward premiums in case the death benefit is provided by insurance contracts, but that the city shall bear the cost of the accidental death benefits when death is due to the employment. The cost of all benefits which is not covered by members' contributions is to be made up by contributions by the city. The member is given the right to designate a beneficiary of the death benefits without any restraints on the designation. The ordinance further provides that payment of benefits under any provision of the Workmen's Compensation Act (St. 1917, p. 831 et seq., as amended) shall be applied as a credit and set-off against any benefits due under the ordinance. In the event of his resignation, the member is entitled to repayment of the amount of his contributions on account of pension and relief only, without interest.

Assuming to exercise its power pursuant to the charter and the ordinance, the city council on October 10, 1932, authorized the city manager to receive bids from insurance companies of the cost of underwriting the city's obligations under the terms of the ordinance. The bid of the Equitable Life Assurance Society of the United States in the sum of \$52,069, to cover the first annual premium for the first five-year period, which was the second highest of seven bids received, was accepted on June 26, 1933, and a portion of the premium was appropriated and paid out of the police and firemen's pension fund with the application for said contract or contracts. It may be assumed that the proposed contracts of insurance provide in all substantial respects a fulfillment of the provisions of the ordinance.

Since at least 1901, the city of Stockton has had in force some ordinance providing a pension fund for the benefit of the members of the police and fire departments of that city,

and even for some years before that date there have been pension provisions applicable to the city of Stockton. *Klench v. Board of Pension Fund Commissioners of the City of Stockton*, 79 Cal. App. 171, 249 P. 46. On January 1, 1932, there was in the pension fund the sum of \$77,082.05. During the ensuing twenty-one months there was not a great fluctuation in the amount of the fund. In three months of that period the amount fell below the sum on hand on January 1, 1932, the lowest amount being \$75,213.85, and in seven of those months the amount exceeded \$80,000. On August 31, 1933, the amount in the fund was \$81,862.77.

In August, 1933, a resolution was passed by the city council authorizing appropriations from the fund for the payment of the balance of \$47,998.18 of the first annual premium under said contracts of insurance and by resolution the pension board registered its consent to the payment thereof. The complaint in the present proceeding was filed in July, 1933.

The main question to be determined is whether the city has the implied power to execute the authority granted by the charter to provide a pension and relief fund by contracting for the payment of its obligations in that respect by an insurance company. The question is also presented whether the city has the power to include provisions for the death benefits in said ordinance.

[1, 2] The proposition is not questioned that provisions for relief and pension funds are not in violation of article 4, § 31, of the Constitution prohibiting the gift of public money. *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366; *Pennie v. Reis*, 80 Cal. 266, 22 P. 176. And we shall not attempt to determine in this case the question whether the city may arrange for the taking out of group life insurance for certain classes of its employees where it may be said that the insurance premiums are paid for entirely out of contributions from the salaries of the employees, as was done and upheld in some cases (*State v. City of Memphis*, 147 Tenn. 658, 251 S. W. 46, 27 A. L. R. 1257; *Nohl v. Board of Education of City of Albuquerque*, 27 N. M. 232, 199 P. 373, 16 A. L. R. 1085), and disapproved and the power denied in at least one case (*People ex rel. Terbush & Powell v. Dibble* [Sup.] 189 N. Y. S. 29; reversed on other grounds, 231 N. Y. 593, 132 N. E. 901). The defendants contend that the provisions for death benefits in the ordinance here involved and contemplated to be covered by the insurance contract are nothing more than provisions for the group life insurance

which was approved in the cases cited, *supra*. But we do not so view the record. Here, by its contract, the city has undertaken to pay at least the accidental death benefits when death is due to the employment, and which may be a large part of the cost of such insurance. Its action in this respect is purportedly pursuant to the power vested in it by subdivision 58 of article 5 of the city charter. That section does not expressly include the right to provide for death benefits, nor is an implication of its inclusion necessary in order to execute the power vested in the city. If the framers of the charter intended that the city should become obligated for the payment of death benefits, the matter could easily have been included, assuming, of course, that such a provision would be constitutional, a question which we do not determine. The defendants in this respect also argue that the accidental death benefit is only what is provided by the Workmen's Compensation Act. But this is not necessarily so. The ordinance contemplates that payments under the Workmen's Compensation Act might be less. Section 9 (c) (1) and (2), St. 1917, c. 586, p. 839, as amended by St. 1929, p. 420. Furthermore, the beneficiaries entitled to the death benefits under the ordinance are not restricted to the classes designated in the Workmen's Compensation Act, but the employee is permitted to name as beneficiary any person, whether related to him or not.

[3] The defendants urge that the execution of the power to provide a pension and relief fund by purchasing a contract of insurance therefor is implied from the provision in question, or if not so implied, then the mode of executing the power, not being expressed in the charter provision, so it is claimed, the city may exercise its discretion as to the mode of execution and the courts will not scrutinize the action of the council unless the exercise of its discretion is arbitrary, capricious, or so unreasonable as to indicate a gross abuse thereof. *Miller v. Boyle*, 43 Cal. App. 39, 184 P. 421; 18 Cal. Jur., p. 901 et seq.

In the first place we are not persuaded that the statement of the power in the charter does not contemplate within itself the mode of its execution, to the extent, at least, that the fund provided should be a fund maintained by the city directly, rather than indirectly through a contract of insurance whereby a third party discharges the city's obligations in that respect from its general assets or funds. The course adopted by the city is not the providing of a fund as contemplated by the framers of the charter. Provisions for funds for various purposes are common in

municipal affairs and it is usually understood that such funds are maintained on deposit as a direct credit to the municipality to be expended by the city for the purpose or purposes designated. There should be no different meaning attached to the language used in the present instance without some express indication otherwise from the provisions of the charter. We feel impelled to conclude that the power conferred on the city by subdivision 58 of article 5 of the charter does not include by implication the power to devote a fund, created and maintained as plainly contemplated by the charter provision, to the payment of premiums on a contract of insurance under which the insurer and not the city is, in effect, to discharge the city's obligation to disburse the funds for pension and relief.

It therefore becomes unnecessary to determine the second phase of the question whether, assuming a choice of method was open to the city in the respect claimed, the providing of the fund by this particular insurance contract was an abuse of its power. A great deal has been said of the factor of safety assured by the adoption of the proposed method, and of the stability of the particular insurance company involved. Assuming to be true all that is contended for in this connection, such considerations might be persuasive only in the exercise of power, but not in the absence of it.

No authority has been presented in which the underwriting by insurance companies of a similar obligation has been approved. In the only case in which similar facts were involved, the exercise of the mode attempted was held to be beyond the power conferred upon the city. *Frisbee v. O'Connor*, 119 Cal. App. 601, 7 P.(2d) 316. It is urged that that case is not in point because the city there involved, the city of Beverly Hills, was a city of the sixth class which is governed by general laws, and does not control in cases like the present where the city is governed under a freeholder's charter. Nevertheless, even assuming the provision for a municipal pension fund or system to be a municipal affair (18 Cal. Jur. 787), the principles of construction stated in that case with reference to the express and implied powers of the city are applicable here and compel a reversal of the judgment. 1 *Dillon, Municipal Corporations* (5th Ed.) pp. 448-450; 1 *McQuillin, Municipal Corporations* (2d Ed.) §§ 373, 377, 386; *City and County of San Francisco v. Boyle*, 195 Cal. 426, 433, 434, 233 P. 965; 18 Cal. Jur., p. 800 et seq.

The judgment is reversed.

2 Cal.2d 600

**XTH OLYMPIAD COMMITTEE OF THE
GAMES OF LOS ANGELES, U. S. A. 1932,
Limited, v. AMERICAN OLYMPIC ASS'N et
al. (STATE, Intervener).**

L. A. 14758.

Supreme Court of California.

March 21, 1935.

1. Associations ⇐19

Olympic games organizing committee held not agent of National Olympic Committee, but independent committee entitled to proceeds of games for distribution among state, city, and county wherein games were held, free from claims of national committee.

2. Charities ⇐4

To create charitable trust, intention to devote funds to charitable purpose must be evidenced.

3. Charities ⇐10

Funds received by Olympic Games Organizing Committee from state, ticket sales, and salvage after completion of games held not dedicated to charitable trust, as contended by National Olympic Committee claiming funds as representative of purpose most nearly cognate to that for which money was raised.

4. Appeal and error ⇐909(6)

Supreme Court must assume from failure of act, authorizing issuance of state bonds to provide funds for conduct of Olympic games, to provide for sharing in returns by state, that legislative intent was to make outright donation (St. 1927, pp. 523-525, §§ 9, 13-16).

5. States ⇐84

State held not entitled to entire proceeds of Olympic games as principal of organizing committee (St. 1927, pp. 523-525, §§ 9, 13-16; St. 1933, p. 966, § 1).

6. Trusts ⇐63¾

No resulting trust for state in proceeds of Olympic games arose, where funds received from sale of state bonds were paid out for expenses on organizing committee's demand, audited by State Olympiad Commission, and no intention to separate beneficial interest from legal title appeared (St. 1927, pp. 523-525, §§ 9, 13-16; St. 1933, p. 966, § 1).

7. Trusts ⇐63¾

Equity will not adjudge trust, in absence of such intention or assumed intention on donor's part.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Xth Olympiad Committee of the Games of Los Angeles, U. S. A. 1932, Limited, a California corporation, against the American Olympic Association and others, in which the State intervened. From a judgment for plaintiff, intervener and defendant association appeal.

Affirmed.

Combs & Combs, Lee Combs, Mitchell, Silberberg & Knupp, Peery Price, and Guy Knupp, all of Los Angeles, for appellant American Olympic Ass'n.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for defendant Los Angeles County.

Bauer, Macdonald, Schultheis & Pettit and John L. Rowland, all of Los Angeles, for Community Development Ass'n.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for intervener State.

Flint & MacKay, William A. Bowen, and Edward L. Compton, all of Los Angeles, for respondent.

THOMPSON, Justice.

Plaintiff corporation commenced this action against defendants for declaratory relief—seeking to have it determined that it had the right to dispose of the proceeds of Xth Olympic games held in Los Angeles during 1932. The plaintiff proposed to retire all outstanding bonds issued by the state to finance the holding of the games and known as California Tenth Olympiad bonds, and, in addition, to turn over to the state a sum equaling the remainder of the total sum received by it as proceeds from the bonds, and thereafter, if any funds remain, to divide them between the city of Los Angeles and the county of Los Angeles through the Community Development Association, Limited. The state of California intervened in the action, claiming that the proceeds of the games belonged as of right to it. The American Olympic Association, brought in by amendment to the complaint, also asserted its claim of right to the funds. The trial court found that the proceeds belonged to plaintiff to be distributed by it free from any claims of the defendants. The state of California (the notice of appeal also naming the California Olympiad Commission) and

the American Olympic Association prosecute this appeal from the judgment.

There are a few facts necessary to an understanding of the controversy and common to both appeals. In 1892 Baron Pierre de Coubertin of France proposed a revival of the ancient Olympic games, and beginning with 1896, when the first modern Olympic contests were held in Athens, the games, with many nations competing, have been arranged regularly every four years with the exception of the year 1916, when the World War rendered impossible the friendly intercourse and competitive participation of most of the great nations. The central body is known as "The International Olympic Committee," which is charged with the duty of fixing the times and places for the celebration of the Olympiads. After the designation of the place, the National Olympic Committee of that nation is intrusted with the organization and management of the games, or the last-named committee may delegate its powers to a special organizing committee "whose officials thenceforth correspond direct with the International Olympic Committee." (Hereafter we shall treat in more detail with this provision for delegation or transfer of authority.) Subsequent to the naming of Los Angeles as the place for the holding of the games of the Xth Olympiad, the plaintiff corporation was organized, and named by the national committee as the special organizing committee charged with the responsibility of organizing and managing the games thereof. The state of California issued and sold Tenth Olympiad bonds in the principal sum of \$1,000,000 "for use in connection with the holding and staging of the Olympic games." The California Olympiad Commission, named in the act providing for the bonds, audited and the state treasurer paid claims made by the respondent corporation upon the proceeds of the bond issue, and funds realized from the bonds were applied in the payment of liabilities incurred by respondent in arranging for and conducting the games. Admissions were sold to the public, concessions were let, and from this source and salvage the respondent realized a sum which it does not desire nor does any of its members wish to retain, but which it desires to distribute in the manner already stated.

[1] With these preliminary facts before us, we shall turn to the

Appeal of American Olympic Association.

The contentions of appellant American Olympic Association, which for the sake of convenience we shall hereafter designate as

the National Committee, are two: First, it asserts that the respondent, the organizing committee, was its agent, and hence the funds belong to it; and, second, that the fund was raised for a charitable purpose, that of promoting peace and good will among the nations through the instrumentality of the games; hence a charitable trust arose, and, inasmuch as the immediate purpose for which the money was raised is incapable of further performance, the funds should be distributed to it as representing the nearest cognate purpose. Considering these arguments in order, let us observe that the first is based largely upon certain language found in the general rules governing the observance of the Olympiads. Our attention is especially directed to the opening paragraph of the "Regulations and Protocol for the Celebration of the Modern Olympiads and of the Quadrennial Games," wherein we read as follows: "The International Olympic Committee in accordance with its established rights having previously fixed the time and place for the celebration of the next Olympiad * * * entrust the organization to the National Olympic Committee of the country in which the chosen town is situated. This country can delegate the duties to which it has been entrusted to a special organizing committee chosen by itself and whose officials shall thenceforth correspond direct with the International Olympic Committee. The powers of this special committee expire with the period of the games in such a case." The quoted language is from the English translation. Section 14 of the "Statutes of the International Olympic Committee" reads: "The French language is the official language of the committee. In case of divergence between the texts, the French text only is to be accepted." Relying upon this provision, the respondent observes a difference between the English text quoted above and the French. It is pointed out that the statement "This country can delegate the duties * * *" is taken from the French phrase "Ce Comité peut Deleger le mandat, * * *" and it is claimed that the latter expression is more properly rendered into English by saying: "This committee may transfer the mandate, * * *" and it is argued that, when so read in connection with other portions of the rules, it becomes manifest that the organizing committee was never intended to become the agent of the national committee. We are compelled to agree with this contention. In the first place, we find by reference to Clifton & Grimaux's New French-English Dictionary (page 284), the verb "deleger" has the meaning "(a)

to send with power to transact business; (b) to instruct, to commit." The French word "mandat," according to the lexicographer, has the same meaning as our word "mandate"—an order, command, charge. Therefore the literal translation would be: This committee may commit the command or may transfer the charge. When this literal interpretation is considered in connection with the fact that upon its assumption of responsibility the organizing committee corresponds directly with the international committee without any supervision by the national committee, it immediately becomes apparent that a new committee independent of the national body was contemplated. This view is reinforced by other provisions of the general rules. Section 8 thereof reads: "The organizing committee of the country chosen for the celebration of the Olympic Games is responsible for the Games and must make all the necessary arrangements. It must carry on all correspondence relating to its work and send out official invitations to the different nations after agreement with the Executive Committee of the I. O. C." The first paragraph of section 12 as rendered in English reads as follows: "The sole responsibility and control of the Games shall vest with that National Committee to whom the organization of the Games has been entrusted, such organization to be carried out in accordance with the regulations and protocol of the Olympic Games." But here the use of the word "National" is doubtful because the French text refers only to the committee organizer in these words: "Le Comité Organisateur."

Furthermore, a detailed study of the rules and the duties imposed upon the organization committee discloses that upon it rested the financial as well as actual responsibility of providing quarters and food for the competing athletes; of paying the expenses of technical delegates chosen by the international federation after their arrival and before the start of their sport; of making all necessary arrangements for the games, which must be taken to include those things which the evidence discloses were done by respondent, such as providing suitable stadiums for usual track and field sports, swimming, wrestling and boxing, rowing, equestrian sports, cycling, shooting, etc., all of which required the expenditure by it, and not by the national or international committee, of large sums of money. Nowhere can be find where either of the two named committees assumed any financial liability for any of the things done by the respondent. It would shock our sense of justice to feel that under such circumstances we

were compelled to hold that respondent, having been successful in its undertaking, is answerable as an agent to either. Happily from the foregoing discussion it appears that the only fair and reasonable construction to place upon the governing articles and rules as well as the acts of all parties is that the organizing committee was independent except in so far as it was necessary for it to submit to the usual and customary usages and formalities of the International Olympic Committee.

[2,3] We therefore turn to examine the question of whether the funds thus realized were dedicated to a charitable trust. Our survey has convinced us that this theory falls upon the very fundamental requisite to such a trust. It cannot be gainsaid that, in order for it to be said that a charitable trust has arisen, there must be evidenced an intention to devote a fund to a charitable purpose. Here the respondent undertook a large business enterprise. It received from the state funds for the purpose of paying necessary expenditures. (As will hereafter appear, the state did not contribute its funds for the purpose of creating a charitable trust.) It sold tickets to enable many thousands of people to observe the best athletes of the world in competition, and, after the celebration was completed, it salvaged from its housing and other facilities a part of the funds on hand. We may properly assume that, in addition to the primary purpose of financing the holding of the games and promoting good will for California, the organizing committee was moved by the general benevolent purpose of the Olympic games, but we fail to find any evidence of an intent to devote and dedicate funds to the furtherance of education or international peace and good will, or any other charitable purpose. We can see no similarity between the situation presented and the contribution of funds directly or through bazaars, where the donors know that the fund is being raised to build a church, or to further some other religious undertaking. Here we are concerned with amateur athletic and other contests, not unlike those which are continually occurring between representatives of our various universities, except that in the present instance it took on the character of international competition. However, looking specifically to the purpose for which the funds were contributed by the state, and it must be remembered that the organizing committee was able to secure an amount not greatly in excess of that given by the state, we may now refer to the argument advanced to the voters of California for the purpose

of persuading them to vote an approval of a constitutional amendment confirming the legislative action providing for the issuance of the bonds. We there read: "The Olympic games are recognized as one of the world's greatest attractions to the country and state in which they are held. When representatives of forty-six nations, composing the International Olympic Committee, voted the Tenth Olympiad to California, they conferred a great honor upon this state and nation, as the Olympiad, held only every four years, possesses so many benefits that other nations and states constantly seek it. The Olympic games comprise scores of thrilling sports events, many gigantic productions, which will be scheduled almost continuously on water, in stadiums, auditoriums and sports fields of this state during nearly the entire year of 1932. During this long period, the spot light of world attention will be focused on California. It is probable that as many as 20,000 athletes and representatives in the many branches of sports from all the nations of the world will be competing to bring honor to their countries. The world press will for nearly two years carry news almost daily from California, exemplifying what is considered one of the greatest advertising mediums known. Unprecedented thousands of visitors from all of America and other countries will come to California to see the games and to tour our state. Many conventions are already being scheduled for California in the Olympic year. The material benefit of the Olympic games to California, therefore, is obviously far greater than the costs. Of vital importance, also, is the fact that through the Olympic games, nations of the world find opportunities for closer relationships and better friendly understandings on the field of athletic competition. Sports in the educational and athletic institutions of America are making for clean bodies and clean minds in American youth who will thus be better equipped to lead this nation in the future. Particularly is this true in California where our youth have developed an unexcelled record in athletics. This state is the sports playground of America and with the Olympic games in 1932, will be the playground of the world. The Olympic games will be a tremendous inspiration to our citizens and children, exerting an influence for good that will be felt for generations. California will add another page to its glory, and in history will be credited with having staged the Olympic games which had their inception in ancient Greece, for the first time on the shores of the Pacific. These are some reasons why our leg-

islature voted a bill and constitutional amendment to aid in the staging of the Olympic games in this state in 1932, and why the voters are asked to approve that action. It appeals to us that it is proper to have the state aid in so worthy and beneficial a proposition." The conclusion is irresistible that there was not an intent to devote the funds to a charitable purpose.

[4, 5] We therefore turn to a consideration of the

Appeal of the State of California.

Preliminarily it should be noted that this appeal is largely academic for the reasons already stated, that respondent proposes to donate to this appellant sufficient to retire the bonds issued to promote the games. However, the state's argument, like the former, is twofold, and may be succinctly stated as follows: The state is the beneficiary of a resulting trust, and the respondent was the agent of the state. We shall reverse the order stated and first consider the question of whether the organizing committee was the agent of the state. The act providing for the issuance of the bonds sheds light upon the problem. The provisions which bear upon the question read as follows:

"Sec. 9. The purpose of this act is to provide funds for use in connection with the holding and staging of the Olympic games in California in 1932; to provide facilities for same, to encourage and assist the participation therein by persons from all parts of the world; to establish a commission to represent the State of California in the carrying out of this purpose and to cooperate to the fullest extent therein with the government of the United States and with other persons, corporations and agencies, and to engage in such activities as may be necessary or desirable to make the holding of said Olympic games in California a success. The commission is hereby authorized and empowered to expend the moneys deposited in the California Tenth Olympiad fund for the purpose of carrying out any and all of the above purposes.

* * *

"Sec. 13. For the purpose of carrying into effect the provisions and purposes of this act the commission shall have power to make and enter into such contracts and agreements with the corporation hereinafter in this section referred to as it shall deem necessary or advisable, to bring about the union or joint action of the commission and said corporation. The corporation above referred to and contemplated by this act is a corporation to

be formed under the laws of this state, for the purpose of conducting, managing, supervising and assuming responsibility for the holding of the events constituting the Olympic games to be held in the State of California in the year 1932, and all activities in connection therewith, in accordance with the rules and regulations of the international Olympic committee for the holding of the Tenth Olympiad; such corporation to be organized and controlled by citizens of this state of recognized responsibility and having the official recognition of the members of the international Olympic committee representing the United States of America; such official recognition may be sufficiently evidenced by the filing with said commission of a statement signed by said representatives that said corporation is the corporation organized for the above purposes, and that it is recognized as such by the international Olympic committee. Said corporation not yet formed may be referred to in this act as the Olympiad corporation. It is contemplated by this act that the Olympiad corporation will assume responsibility for the holding and staging of the said Tenth Olympiad in California, under the sanction of, and in accordance with, the rules and regulations of the international Olympic committee; that the commission will cooperate to the fullest extent with the Olympiad corporation to the end that all moneys in the California Tenth Olympiad fund shall be expended to the best possible advantage in assisting toward the carrying out of the above purposes in full and complete harmony with the plans of the Olympiad corporation.

"Sec. 14. The contract, or contracts, if any, entered into by the commission with the Olympiad corporation shall be construed to include a provision, whether specifically written therein or not, giving to the commission and its authorized representatives the authority to examine the books, records, contracts, accounts and vouchers kept by the said Olympiad corporation at all reasonable times.

"Sec. 15. The commission shall ask and demand that in the expenditure of any fund in connection or conjunction with the fund herein described, proper books of account shall be kept and maintained and an appropriate accounting system shall be had, and that such records and books shall be maintained and kept within the city of Los Angeles as will enable a person of ordinary understanding, from the inspection thereof, to determine the source and amount of all income and moneys received and the exact purpose in detail for which expenditures are made or

moneys paid. Said books of account shall be open for inspection by any authorized representative of the commission.

"Sec. 16. The State of California shall not in any manner or under any circumstances be liable for any of the acts, doings or proceedings of any person, association or corporation with whom the commission shall act, cooperate, or join to carry out the purposes of this act, nor for the services, salary, labor or wages of any officers, agents, servants or employees of such person, association or corporation, nor for any debts, liabilities or expenses of any kind whatsoever of such person, association or corporation; provided, however, that the commission may, in its discretion, employ the same persons, servants, agents or officers that may be employed by such person, association or corporation with which the commission shall act, cooperate and join to carry out the purposes of this act, and contribute to pay the whole or any part of their compensation." St. 1927, p. 518.

It will immediately be observed that there is not only no suggestion of agency, but also an express disavowal of responsibility as well as an entire failure to provide that the state should share in the returns, if any.

The state's contribution to the Panama-Pacific International Exposition was made upon the condition that it share in the proceeds. See Panama-Pacific International Exposition Co. v. Panama-Pacific International Exposition Commission, 178 Cal. 746-748, 174 P. 890, 891. The decision of this court in that case is persuasive of the conclusion here that there was no attempt to make the organizing committee an agent of the state. In the cited case the principal question was whether the state was entitled to five-elevenths or five-sixteenths of the proceeds; the state having contributed in round figures the sum of \$5,000,000, with the express understanding that it should "share proportionately with the contributors to the said Panama-Pacific International Exposition in the returns," and the stockholders having paid in \$6,000,000, and the city and county of San Francisco having contributed \$5,000,000 without a provision corresponding to that of the state. It was determined that the state was entitled to five-elevenths instead of the smaller percentage; the court saying: "The company is, of course, entitled to all the returns from the exposition, except so far as the law or its own contracts may have otherwise provided. It is agreed that San Francisco donated its \$5,000,000 outright, without exacting the condition that it should have any share of the returns. It was a contributor, but it was not

a contributor entitled to a share or interest in the returns. Hence, neither the state nor the company is required to share the surplus with San Francisco." In the present case the state is in the same position San Francisco was in the above case. Some significance attaches to the fact that, while the act authorizing the Olympic bonds appears to have been patterned after the constitutional amendment authorizing contribution to the Panama-Pacific International Exposition, yet the Legislature did not include the proviso with respect to sharing in the returns. We must, in accordance with a well-known rule of statutory construction, assume that it was the legislative intent to make an outright donation.

Even more pertinent is the language found in *World's Columbian Exposition v. United States* (C. C. A.) 56 F. 654, 673, as follows: "We think, furthermore, the position that the exposition was exclusively an undertaking of the United States, and the corporation a mere agent, is shown to be untenable by the consequence contended to be deducible therefrom that therefore the corporation, while responsible to the state of Illinois for the proper exercise of its franchises, and to its creditors and stockholders for the proper administration of its affairs and property, might be subjected to obligations which it never incurred, and to indebtedness which it never created, and its ability to discharge its legitimate functions and respond for its legitimate liabilities might be at any moment utterly destroyed. We find no warrant in the documents before us for holding that the corporation occupied any relation involving such results. The original amount of expenditure was defined, and the assumption to pay and the payment of the further amounts rendered necessary by the expansion of the scope of the affair constituted, under the circumstances, no recognition of the right to impose obligation compulsorily and without consent. We perceive no reason for attributing to congress, while disclaiming any responsibility whatever for the acts and doings of the corporation, or liability for its obligations of any kind, or any liability for its own designated agents beyond specified amounts, the intention that those agents, or either of them, might contract indebtedness independently of the corporation, which the latter would be compelled to pay. In the Philadelphia case the exposition was managed by two bodies organized by authority of congress, yet their rights and property were not regarded as in any legal sense the rights and property of the United States. The supreme court held them to be merely organizations through which the peo-

ple might carry out an enterprise of their own, which was national, in that it had the sanction of the government, but was not therefore a governmental enterprise. *Eyster v. Board*, 94 U. S. 500 [24 L. Ed. 188]. The supreme court said, speaking through Mr. Chief Justice Waite, that it was very apparent that the object of congress in all its legislation with reference to the Centennial Exhibition was to enable the people of the United States to commemorate 'the completion of the first century of their national existence' by an exhibition 'in which the people of the whole country should participate,' and which should have the sanction of the government, and that in that sense the object was national; but that it was equally clear that until the act of 1876 it was expected that the entire expense would be borne by the people without assistance from congress. And as to the appropriation of 1876 it was held, under the terms of the act, that after payment of debts the amount had to be returned before any distribution to stockholders—a result reached by construing the word 'profits,' as used, to be equivalent to 'net receipts.' In that case, as in this, congress, out of abundant caution, lest the enterprise might be regarded as governmental, and, if so, some question might be raised as to the operation of state laws, provided that nothing in the act of congress should be construed so as to override or interfere with such laws or contracts made thereunder; but this was as a measure of precaution, and not by way of a necessary reservation of state jurisdiction, which had not been ceded, and could not be held as surrendered by implication."

As we have already observed with respect to a similar contention by the national committee, it is not reasonable to suppose that the state would disavow all responsibility or liability for the acts of one who was to represent it as agent. Indeed, this appellant, by legislative enactment, has put a similar construction upon the act in question, not only with respect to the contention now being examined, but also with regard to the second argument respecting trusts. On May 15, 1933, the Governor approved an act permitting the state treasurer to accept a donation for the retirement or purchase of the California Olympiad bonds (St. 1933, p. 966), section 1 of which reads as follows: "The State Treasurer is hereby authorized to accept a donation for the purpose of meeting the interest and redemption of the Olympiad bonds issued under an act of the Legislature passed in 1927. Any donation made under the provisions of this act shall be set aside in the

treasury as a special fund and invested by the State Board of Control, and the interest therefrom shall be used to pay the interest on the outstanding bonds until the fund donated for that purpose shall be sufficient to retire the outstanding bonds and pay the interest thereon, at which time said fund shall be liquidated and used for such purpose."

The legislative enactment, being a construction of the former statute, would seem to set at rest any question of the state's right to claim either as principal or as the beneficiary of a resulting trust.

[6, 7] However, examining specifically appellants' argument in so far as it is urged that the state is entitled to the proceeds upon the theory of a resulting trust, we fail to find therein sufficient upon which to declare that such a trust has arisen. First, it is obvious that the purposes for which the money was raised and expended have been fully realized. In accordance with the act which authorized the bonds, the funds were paid out for expenses upon demands of respondent audited by the Olympiad commission. Hence there can be no resulting trust upon the theory that the purpose for which the funds were transferred has failed in whole or in part. The case lacks the element of intention or assumed intention on the part of the donor, without which equity does not undertake to adjudge a trust. See Pomeroy's Equity Jurisprudence (4th Ed.) vol. 3, §§ 1031, 1032. Nor does it appear that there was any intention to separate the beneficial interest from the legal title. The plain truth of the situation is that the state subsidized the staging of the Olympic games, without thought of return, other than that which indirectly followed from attracting people from the world over to join with us here on the Pacific slope in an international friendly contest.

The discussion with respect to the first class of trusts applies in a degree to the second class; it being urged by appellants that the case may be likened to one where A furnishes the consideration but title is taken in the name of B. We have already directed attention to the magnitude of the responsibility assumed by respondent and placed there by statutory enactment, and to the intent to subsidize the games. Both of these factors negative such a trust. Furthermore, the evidence discloses that the funds realized and the subject-matter of this action were largely from the sale of tickets to those who witnessed the contests. Again, we are faced with the legislative failure to provide that the

state should share in the returns as well as the practical construction involved in the act authorizing the acceptance of the donation for a particular purpose.

It follows that the judgment should be, and it is, affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



2 Cal.2d 698

ABRAHAM v. SIMS et al., School Trustees.

L. A. 14966.

Supreme Court of California.

March 26, 1935.

1. Mandamus ⇨77(4)

Evidence held to show that, notwithstanding permanent teacher's alleged original refusal, because of salary reduction, to sign contract for ensuing year, such refusal, before being acted upon by board of trustees, was to knowledge of majority of members thereof, so qualified that it could no longer be treated as refusal, entitling teacher, who offered to perform duties, to mandamus compelling reinstatement (School Code, § 5.500, as added by St. 1931, p. 1394, § 4).

Evidence showed at most that, as of time board accepted what it saw fit to treat as teacher's resignation, teacher had not actually refused to teach for salary offered, but had not affirmatively expressed a willingness to waive any excess over the offered salary that might turn out to belong rightfully to teacher or that board might be willing to concede to her; it appearing that teacher considered salary reduction inequitable as to her, since in preceding years her salary had not been increased in accordance with that of other teachers of same classification.

2. Schools and school districts ⇨133

Permanent teachers under statute have vested right to be so classified and to teach as permanent instructors in particular district where right has been secured, subject to reasonable rules not in conflict with law (School Code, §§ 5.500-5.504, as added by St. 1931, p. 1394, § 4).

3. Schools and school districts ⇨133

Right to teach is incident to classification as permanent teacher and, after three

consecutive years of employment and service and re-election by board for succeeding school year, law, as of beginning of that year, automatically effects the classification and nothing more is required to accomplish it (School Code, § 5.401, as added by St. 1929, p. 748; § 5.500, as added by St. 1931, p. 1394, § 4).

4. Schools and school districts ⇨133

Permanent teacher, unless notifying board to contrary or failing to appear for purpose of teaching at opening of school year, must be deemed to have accepted re-employment (School Code, § 5.401, as added by St. 1929, p. 748; § 5.500, as added by St. 1931, p. 1394, § 4).

5. Schools and school districts ⇨144(4)

Trustees of school district have power to raise or reduce salaries of permanent teachers, provided power is reasonably exercised and no attempt is made after beginning of particular school year to reduce salaries for such year (School Code, § 5.500, as added by St. 1931, p. 1394, § 4).

6. Schools and school districts ⇨141(1)

Trustees of school district have power to change permanent teacher's assignment and from time to time to prescribe his duties, so long as the power is reasonably exercised and duties prescribed are in line of his profession and he is not required to teach outside district (School Code, § 5.500, as added by St. 1931, p. 1394, § 4).

7. Schools and school districts ⇨133

Permanent teacher not refusing to do duties is not bound, on pain of forfeiture of permanency of status, to abandon his bona fide views as to compensation to which he is entitled (School Code, § 5.500, as added by St. 1931, p. 1394, § 4).

SHENK, J., and WASTE, C. J., dissenting.

In Bank.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Mandamus proceeding by Beulah J. Abraham against Virgil J. Sims and others, as Trustees of the Brawley Elementary School District, County of Imperial, State of California. From a judgment denying the writ, petitioner appeals.

Reversed.

Prior opinion, 34 P.(2d) 790.

W. E. Abraham and H. B. Stewart, both of Brawley, for appellant.

Elmer W. Heald, Dist. Atty., and S. L. McCrory, Asst. Dist. Atty., both of El Centro, for respondents.

PER CURIAM.

After further consideration of the questions involved in this proceeding, we are of the opinion that the decision rendered by the District Court of Appeal correctly determines the matters at issue therein. We therefore adopt the opinion of that court written by Mr. Justice pro tempore Haines as the opinion of this court. It is as follows:

This is a mandamus proceeding instituted by Beulah J. Abraham, as petitioner, to require the respondents Virgil J. Sims, A. M. Whipple, and W. W. Goodson, as members of and constituting the board of trustees of the Brawley school district in Imperial county, Cal., to reinstate her as a teacher in the Brawley schools; to classify her as a permanent teacher in said district and to issue warrants for her salary as a teacher in said schools for that part of the year 1932 which had elapsed between the opening of said schools on September 19, 1932 and the filing of this petition on November 14, 1932.

The petition alleges that said Sims, Whipple, and Goodson have constituted and do constitute the board of trustees of said district, and that one McIntire has been and is the superintendent of schools for said district; that the petitioner was employed as a teacher in the schools of said district for the school years 1927-28, 1928-29, 1929-30, 1930-31, 1931-32, and by reason of having taught therein for a period of three years became entitled to be classified as a permanent teacher under the provisions of section 5.500 of the School Code (as added by St. 1931, p. 1394, § 4), and upon her re-election and employment as a teacher in said schools for the year 1930-31 she became such permanent teacher. It is further alleged that on September 16, 1932, she was notified by said McIntire that she had been assigned to teach 4B and 5B grades in one of the schools of said district for the year 1932-33; that on September 19, 1932, the date on which the school year commenced, she presented herself at the school ready and willing to proceed with her duties as such teacher, but that without assigning any reason therefor McIntire refused to allow her to do so; that on the next two days she again presented herself with the same result; that on the last of these days he told her she would no longer be permitted to teach in said schools and that she need not return, and at that time placed another teacher in charge of the classes to which she had been assigned. It is further alleged that she afterward received from respondents a letter to the effect that

on September 20, 1932, the board had "accepted the return of an unsigned contract as her resignation as teacher in said schools"; that it is untrue that she ever refused to sign any contract tendered her by respondents, and it is untrue that she ever tendered any resignation as such teacher; but that on the contrary she has at all times since the beginning of said school year been ready and willing to assume and perform her duties as such teacher and has so notified respondents both verbally and in writing; that she has demanded reinstatement as a teacher and that she be permitted to assume and perform her duties as such "under the classification to which she was entitled"; but that respondents and their said superintendent made no reply to her communications and have refused to reinstate her; that no charges for her removal as a teacher have been preferred against her and that she is the holder of a life certificate from the state and has all the qualifications required by the School Code to entitle her to classification as a permanent teacher. Respondents, she says, refuse to issue warrants for her salary from the beginning of the school year 1932, and she has no plain, speedy, and adequate remedy in the ordinary course of law.

Respondents answered, admitting many of the allegations of the petition, but claiming that her employment for the year 1930-31 did not include the first month of that year. They admit that at the beginning of the school year 1932-33 she presented herself and offered to assume her duties as alleged, and admit that McIntire refused to allow her to do so, and that they have, for what they describe as the "current school term," refused to draw any salary warrants in her favor. This refusal they justify by saying that at a meeting on April 18, 1932, they ordered a general reduction of the salaries of all teachers in the elementary schools of the district, that all \$1,600 salaries, including petitioner's, were reduced to \$1,557 "for the next school term" (evidently meaning "year"), of all of which petitioner was notified in May, 1932; that she was subsequently tendered, by respondents, a contract for teaching at such reduced figure for the school term (year) beginning September 19, 1932, but refused to sign it and has ever since persisted in such refusal, for which reason respondents have refused to permit her to enter upon the duties of a teacher for that term (year).

To this answer the petitioner interposed a demurrer, which was overruled. Thereafter the case was tried and judgment rendered in

favor of respondents, denying to petitioner the writ sought. Hence this appeal.

It is petitioner's claim that she never in fact refused to sign the contract tendered her, but, on the contrary, was prevented by respondents and their superintendent from doing so. It is her further claim that, since she had become a permanent teacher, no new contract was necessary to the continuance of her status as such; and, therefore, that in the absence of any evidence that she intended to abandon her position as such teacher, her action in returning unsigned the contract tendered her could not amount to a resignation or justify respondents in treating her position as vacant. Respondents dispute the correctness of both of these contentions, and it will, therefore, be necessary to consider them.

It appears that for the school year 1931-32, petitioner had been employed at a salary of \$1,600, and the respondents, at a regular meeting held on April 18, 1932, voted to fix, for the succeeding school year, the salaries of all teachers then receiving pay at the rate of \$1,600 per year, at the lower rate of \$1,557 per year. A teachers' meeting attended by petitioner was held on the following day, at which this reduction was explained by McIntire, the superintendent. For some reason, not clearly disclosed by the record, respondents undertook to dispense with petitioner's services for the ensuing school year and she was so notified on May 16. Either just before or just after that time, she raised the question of her classification as a permanent teacher. Respondents took the position that since she had not served during the first month of the school year 1930-31, she was not entitled to be so classified and it was agreed that the question should be submitted to the district attorney. His opinion was that she was entitled to this rating and he submitted the question to the Attorney General, who expressed the same opinion. These rulings were ultimately accepted by respondents, who held a meeting on September 16, 1932, three days before school was to open, and voted to offer petitioner a contract for the school year 1932-33, at the \$1,557 rate. Such a contract was on the same day prepared, executed by the clerk of the district and handed to a Mrs. Burris, who was McIntire's secretary, to take to petitioner, which was done. Petitioner's account of what she said to Mrs. Burris and the latter's account of the interview differ. Mrs. Abraham says that when the contract was handed to her she said: "I want to see if the salary is what it should be before I sign it." That she looked at it and said: "No, the

salary is not what it should be." She says that she spoke of the omission to raise her salary in the preceding year (1931-32), when the salaries of others in her group were raised, though in former years she had participated in such salary increases as they had received. Her point seemed to be that if salaries were now to be reduced, this ought not to apply in her case as she had not, for the last year, received an increase when the rest in her group had. She says that she then asked Mrs. Burris to take the contract back to McIntire "and show it to him and tell him about the salary," and she added, "If it is not all right 'phone me and I will come over"; that Mrs. Burris took the contract back, and though she, that is, Mrs. Abraham, expected her to return with it, she did not.

Mrs. Burris testified: "I handed Mrs. Abraham the contract and before she looked at it she said she didn't believe she was going to sign it, and then she got her glasses—she read it over and she said, 'No, I won't sign that, this is not the right salary. I won't sign that contract,' and I took it back to Mr. McIntire's office. * * * I told her I would take it back and give it to him. She said, 'I will come over and see him this afternoon. I don't have time right now.'" Mrs. Burris went on to say that she did not see Mrs. Abraham further that afternoon (Friday), but that she saw her go into McIntire's office the next morning (Saturday, September 17), between 9 and 10 o'clock, and that on that (Saturday) afternoon Mrs. Abraham had told her that "she didn't mean to send the contract back, that she just meant to have it come back for consideration of the salary and I told her I brought it back and told Mr. McIntire she would not sign it because the salary was not right." Asked further about what Mrs. Abraham had said to her the preceding afternoon, Mrs. Burris said: "She said that she thought she should have had more money the previous year, her salary was not right, and that she wanted to see if she could not get the difference in the salary she got and what some of the other teachers got, she thought she should have got the same as them that year." She further testified that Mrs. Abraham never did say that she would work for the salary specified in the contract offered her, but that on Saturday, October 1, 1932, Mrs. Abraham had come to witness' home and "said she didn't quite remember what was said and wanted to know if I would tell her what she said that day I delivered her the contract, and I told her I went back and told Mr. McIntire she would not sign it because it was not the right salary," whereup-

on, "she told me she had went to Mr. McIntire and he had refused to give her the contract. She asked for it again on Saturday morning, and then we didn't talk about it any more."

Mrs. Burris testified further that McIntire had put the contract in the safe on instructions from respondent Sims. Asked whether when she had originally taken the contract to Mrs. Abraham the latter had not asked her to take the contract back to McIntire "for the purpose of ascertaining whether or not the salary mentioned therein was correct," her answer was: "She just said she wouldn't sign it, that the salary was not right * * * she said something about calling her, but I didn't have time. I thought she would come over."

McIntire testified that pursuant to the board's action on September 16, he caused a contract at a salary of \$1,557 to be submitted on that day to Mrs. Abraham by his clerk, Mrs. Burris; that she brought it back and after a conversation with respondent Sims, who was in the office, he (McIntire) placed it in the safe; that next morning Mrs. Abraham called between 9 and 10; that he had a private conversation with her in his inner office, at which time "she told me that she had returned the contract and she was not willing to sign it because it was not a sufficient salary. I asked her if she had been delivered a contract the previous day, and she said, 'Yes.' I asked her if she returned it voluntarily, and she said 'Yes,' and she added she was not willing to sign it because it was not sufficient salary. * * * I told her that I would be glad to submit, that I intended to submit the matter to the Board at the next meeting on September 20, and they would take care of the matter, and if she wished to be present at that meeting, we would be very glad to have her." He says that the contract, at the time of the conversation, was in the safe and that Mrs. Abraham neither said that she wanted to sign it nor that she would work for the \$1,557. He did say, however, that he told her that the contract had been placed in the safe at the direction of respondent Sims, who was chairman of the board; that he did not then offer it to her to sign and he does not know whether she then wanted to sign it or not. He admits that on the same morning at his own suggestion she attended a teachers' meeting at which he introduced her as a teacher of grades 4B and 5B. He admits that on Monday, Tuesday, and Wednesday (September 19, 20, and 21) she presented herself for the purpose of teaching and that he refused to permit her

to do so. He says that she did not, even up to the time of the trial, express any willingness to teach for the salary offered her.

All three of the respondents testified at the trial. Sims, the chairman of the board, says that when Mrs. Burris came back from Mrs. Abraham's house on the afternoon of September 16, he happened to be in the office and directed McIntire to put the contract into the safe until the board could act on it. Some one, and Sims believed it was he, suggested that an opinion be gotten from the district attorney about the legal effect of Mrs. Abraham's having returned the contract unsigned. This was done and apparently the opinion rendered was that her act was tantamount to a resignation. Sims had an interview with Mrs. Abraham on Sunday, September 18. "She told me she had refused to sign a contract on account of the stipulated salary * * *. She told me in the conversation that she thought she had been discriminated against the year before." He says he doesn't remember her saying that she would teach for the coming year at the salary fixed by the board. I said: "If you are not satisfied with the salary schedule, and not satisfied with the assignment given you, or if you are not satisfied with anything, why did you send the contract back when it was presented to you, and that she had twenty days to work out any difficulty that might arise between her and the Board, or Mr. McIntire, or classification, or anything else, and she said she realized she had made a mistake." He discouraged her from presenting herself on the following day to teach, saying that McIntire could not allow her to do so. He admits that on September 20, when the board undertook to treat the return of the contract as a resignation on her part, it was advised that she had presented herself and claimed the right to teach.

Respondent Whipple, clerk of the board, testified that: "Mrs. Abraham called me on Saturday preceding the meeting of the 20th and asked me to come over. She said she had something she wanted to talk to me about, but I didn't go and nothing about the contract was mentioned over the 'phone." As to the reason for the action taken on September 20, he said: "My feeling was that she was offered the contract at the regular rate, and had turned it down, and therefore, there was nothing else the Board could do."

Respondent Goodson, the third member of the board, testified that Mrs. Abraham came to his house on Saturday evening, September 17, and that "she was very much disturbed about the contract, about not being able to

sign the contract when she went to school the next morning, or that morning." He told her the board would meet on September 20 and that she might be there if she wished. "She stated then the salary was the reason she returned it," i. e., the contract. She said she had sent it back with the idea of discussing that matter with McIntire. "I took it that he didn't let her sign the contract because it had been returned to him the evening before and was in the safe there in the office and he had no authority to let her sign it." Asked why the board made no effort to adjust matters with Mrs. Abraham, Goodson said: "We have so much criticism on permanent teachers from a great majority of people in the district, and when Mrs. Abraham returned that contract unsigned, we took it as the same as her resignation; naturally we made no effort to adjust the salary schedule with her because of the feeling up there; and we wanted to get away from this permanent teaching, this tenure of office. That is the whole thing in a nutshell. There is no objection to Mrs. Abraham." Her services, he said, were perfectly satisfactory. He was asked: "The only reason you didn't take any action was you wanted to, if possible, evade the permanent tenure law?" His reply was: "Exactly."

On September 27 Mrs. Abraham wrote McIntire to the effect that she had not returned the contract "other than for information as to whether or not the salary therein mentioned was correct"; that the day following she had called at his office for the purpose of signing the contract "and adjusting the salary to which I would be entitled later," but "you refused to permit me to sign the contract and informed me that I was not entitled to teach during this year"; that if the board had accepted her action as a resignation it must have been because of his failure to inform it of the facts. She concluded: "I am making demand upon you at this time for the delivery of my contract for my signature, and permission to resume my duties as a teacher in the Brawley Elementary Schools within my proper classification."

On October 4, 1932, she wrote the board a letter reciting that on September 19, 20, and 21 she had been present at the school to which she had been assigned but was prevented by McIntire from performing her duties and that on the latter date he had informed her that she would not be allowed to teach because the board had decided that the returning, unsigned, of the contract on September 16 amounted to a resignation, that she advises the board that she did not refuse

to sign it but merely returned it to ascertain if the salary mentioned in it was correct "because of my status as a permanent teacher"; also stating that on September 17 she had called at McIntire's office to sign the contract but had been told by him that the contract was locked up in the safe and that she would not be permitted to sign it.

No attention was paid to either of these letters.

The trial court found: "That the petitioner refused to accept and/or sign the contract so offered to her by respondents and gave, as her reason therefor, that the salary was not right; that at no time thereafter did she offer to teach for the salary specified in said contract, but has at all times herein refused to do so; that thereafter respondents placed another teacher in charge of the classes to which petitioner had been assigned."

[1] It may be conceded that the testimony conflicts as to whether, before the board's action of September 20, Mrs. Abraham refused to sign the contract presented to her. If she returned it merely to obtain further information on the subject of her salary, and made that clear to Mrs. Burris or to McIntire, such action on her part could not be deemed a refusal to sign it. Mrs. Burris, McIntire, and Sims have all quoted her as saying, either that she did refuse, or had refused, to sign it. There is enough of a conflict, therefore, in the evidence so that, if nothing more had transpired, we would feel bound by the finding that she did so refuse. Such refusal, however, was not necessarily final. Even if her relations with the board had been purely a matter of contract she might lawfully have reconsidered her decision at any time before the board acted upon it at its meeting on September 20, at least if she did not in the meantime omit to perform, or offer to perform, her duties as a teacher. There can be no question from those passages from the testimony of respondents Sims and Goodson, which we have recited, that both of them knew prior to the board's meeting on that day that Mrs. Abraham's attitude was no longer, if it ever had been, one of unequivocal refusal to sign the contract, for, according to Sims, she had told him that she had in returning it "made a mistake" and according to Goodson she was "much disturbed" about her inability to sign the contract on Saturday morning. With this knowledge of her attitude, both of these men, who together constituted the majority of the board, participated at the meeting in treating her refusal

to sign as definite. We are of the opinion that the evidence shows without any conflict that at the time they acted upon her supposed refusal to sign the contract, such refusal, if there ever had been one, had been, to their knowledge, so qualified that it could no longer be treated as such. The third member of the board knew at the time that she wished to communicate something to him, the nature of which he did not take the trouble to learn. Moreover, we do not think the record contains any substantial evidence that Mrs. Abraham would not have taught for the school year 1932-33 even had she been entitled to no greater salary than the \$1,557 offered her, or that she ever actually refused to teach for that salary. Certainly, in presenting herself at the opening of the school, she manifested the willingness to perform her duties and take at least the chance that she might be found entitled to no greater salary than that. True, McIntire quotes her as saying that she "was not willing to sign the contract and teach for that amount of money." In the light of other evidence the most she could have meant by this, if she said it at all, was that she was not willing to waive any additional salary to which she might be entitled. Again, if it be true, as McIntire claims, that when she called on Saturday, September 17, she neither asked to be allowed to sign the contract nor was she refused the opportunity to do so, she had the right to treat the statement which he says he made to her that morning, that he would submit the matter to the board at its meeting on September 20, as a promise to submit to the board the question, not of dispensing with her services, about which nothing seems to have been said at that time, but the matter of what her salary should be.

Taking the evidence in the light most unfavorable to her, we think the most it can be said to show, so far as Mrs. Abraham's conduct is concerned, as of the time the board accepted what it saw fit to treat as her "resignation," is that she had not affirmatively expressed a willingness to waive any excess over the \$1,557 salary that might turn out to rightfully belong to her, or that the board might be willing to concede to her.

No point seems to be made of the circumstance that Mrs. Abraham, for some reason, did not teach during the first month of the school year 1930-31, and we shall, for the purpose of this decision, assume that her status in the Brawley school district, as of the time that respondents, through McIntire and his clerk, Mrs. Burris, tendered her the contract

for the year 1932-33, was that of a permanent teacher within the meaning of section 5.500 of the School Code.

[2-4] As was said in *Leymel v. Johnson*, 105 Cal. App. 694, 702, 288 P. 858, 862: "The conclusion that the status of a teacher is that of an employee is irresistible. The position is secured by selection by the board of trustees, and the terms of the employment are fixed by contract, the authority for which is found in the Political Code (section 1609). Under its general powers the board of education is authorized to enter into contracts with teachers and fix their compensation and terms of employment. *Marion v. Board of Education*, 87 Cal. 606, 32 P. 643, 20 L. R. A. 197." The authority to employ teachers is now contained in article 1 of chapter 1 of part 3 of the School Code (section 5.400 et seq.), and the provisions in respect to fixing their compensation in article 1 of chapter 8 of part 3 thereof (section 5.730 et seq.). Notwithstanding, however, that the relation between a teacher and the board of trustees is essentially one of contract, and that, until the teacher has attained a permanent status, his or her re-employment in succeeding years is a matter purely in the board's discretion, the situation is so far modified by the teachers' tenure enactments (now represented by sections 5.500 to 5.504, both inclusive, of the School Code [as added by St. 1931, p. 1394, § 4]), that as said with respect to permanent teachers in *Dutart v. Woodward*, 99 Cal. App. 736, 739, 279 P. 493, 494, "The Legislature has conferred upon teachers, under specified circumstances, a vested right to be so classified and to teach as permanent instructors, in the particular district where this right has been secured, subject to such reasonable rules as may be adopted, which are not in conflict with law." The result of these enactments was not to make the relation any the less one originating in contract, but to annex to contracts of employment when repeated for a sufficient time certain legal consequences. These consequences are not contractual except in the broad sense of being annexed by operation of law to the contract and have been said to be "in the nature of a civil service regulation." *Buckbee v. Board of Education*, 115 App. Div. 366, 100 N. Y. S. 943, 950, cited in *Fidler v. Board of Trustees*, 112 Cal. App. 296, 305, 296 P. 912. One of the consequences is a permanent right to teach so long as the board's reasonable regulations are complied with, save in certain exceptional circumstances with which we are not here concerned. This right to teach is an incident to classification as a permanent teacher and

after three consecutive years of employment and service, and re-election by the board for the next succeeding school year, the law as of the beginning of that year automatically effects the classification, and nothing more is required to accomplish it. School Code, § 5.500; *Grigsby v. King*, 202 Cal. 299, 307, 260 P. 789; *Owens v. Board of Education*, 68 Cal. App. 403, 405, 406, 229 P. 881; *La Shells v. Hench*, 98 Cal. App. 6, 13, 276 P. 377; *Gastineau v. Meyer*, 131 Cal. App. 611, 617, 22 P. (2d) 31. It was said in the *Buckbee* Case that the board's obligation is merely "to re-employ the teacher from year to year, as if taken from an eligible list of the civil service." Under our statute, however, no affirmative action of the board is requisite to accomplish such re-employment. It is automatically done by virtue of sections 5.500 and 5.401 (St. 1929, c. 428), of the School Code, and a permanent teacher need not even notify the board of his acceptance, such notice under section 5.402 being only required of those not "under permanent tenure." The manifest implication is that unless he notifies the board to the contrary or fails to appear for the purpose of teaching at the opening of the school year he must be deemed to have accepted the re-employment. In these circumstances it is questionable whether under our own system what has occurred is very happily described as a "reemployment" at all and whether it would not be more aptly designated as a "continuance of an employment." It is perfectly true, as said in *Martin v. Fisher*, 108 Cal. App. 34, 39, 291 P. 276, 278, that "the position of a teacher in the public schools of California is not an office." It is strictly an employment and initiated by a contract. But, as said in the case last cited: "The becoming a permanent teacher, and the continuation of this employment, is a right given by statute."

* * *

[5, 6] The Legislature in this state designed to give to teachers, under the defined conditions, a permanency of tenure, but this has, however, been held to carry with it no assurance against change in salary. That phase of the subject has been so ably discussed in *Fidler v. Board of Trustees*, supra, 112 Cal. App. pages 301-305, 296 P. 912, that it is needless to enlarge upon it here. The power of the trustees to raise or reduce the salaries of permanent teachers cannot be doubted, provided it is reasonably exercised and no attempt is made after the beginning of any particular school year to reduce the salaries for that year. No more can it be doubted that despite the permanency of a teacher's tenure the board is fully empowered to change his

assignment, and from time to time to prescribe his duties, so long as such power is reasonably exercised and the duties prescribed are in the line of his profession and he is not required to teach outside the district. *Dutart v. Woodward*, *supra*. It was said, however, in *Fidler v. Board of Trustees*, 112 Cal. App. page 301, 296 P. 912, 914: "Respondents do not contend, however, that there can be any arbitrary or unreasonable exercise by the board of the power to reduce the salary of a permanent teacher." And with respect to the assignment of duties it was said in *Dutart v. Woodward* that: "For the refusal on the part of the teacher to comply with * * * unreasonable or dangerous assignments, the board would have no legal authority to prefer charges against the teacher and deprive her of her lawful status as a permanent teacher."

In the instant case Mrs. Abraham seems to have entertained the belief that she had been discriminated against in an arbitrary way in the matter of her salary; that instead of its reduction having been made on the basis of the sum that she should have received the previous year, it had been made on the basis of a lesser sum than she had been required to accept for that year. We cannot possibly determine from the present record whether she had, on that score, any just ground for complaint or not; but we are emphatically of the opinion that her whole conduct, as shown by the record, and as known to at least a majority of the board when it undertook on September 20, 1932, to accept her "resignation," presented no "resignation" for their acceptance. Counsel for respondents insist that *Fidler v. Board of Trustees*, to which we have referred, and with which as to much of what is said in the opinion we agree, requires an affirmation of the judgment here. The petitioner in that case, who occupied the status of a permanent teacher, had for the school year 1928-29 been employed as a vice principal at a salary of \$2,900. The board of trustees, having decided to assign to him duties for 1929-30 that only involved teaching offered him a contract for that year at \$2,500. This led to correspondence back and forth, including a letter under date of June 17, 1929, in which he informed the board that "I have refused your offer of contract," referring to grounds set out in a previous letter in which he had disputed the board's right to reduce his salary. He went on to say, however, that he maintained his right to continue as a permanent teacher under his former salary. At the beginning of the school year he presented himself but was assigned

no duties. The board thereupon wrote him asking him to teach, reiterating its willingness to pay him the \$2,500 salary, and saying that unless he commenced teaching it would be forced to conclude that he refused employment. He replied that he was ready to teach, that no teaching had been assigned him, but that he should "expect to be paid the sum to which I am legally entitled, whether it be twenty-five hundred dollars or twenty-nine hundred dollars."

The court said of the correspondence: "We think these letters manifest a refusal on the part of appellant to accept the offered contract. Conceding, however, only for the purpose of discussion, appellant's contention, that he was willing to work for \$2,500 per year, leaving the amount of his compensation to be determined later by litigation, or otherwise, to be meritorious, it is met and overcome by conflicting evidence." This conflicting evidence was, according to the opinion, a stipulation that witnesses would testify that by reason of petitioner's refusal to accept the precise terms of the board's offer "and by reason of the position and demands of petitioner," the board made other arrangements for the performance of the duties assigned to the petitioner, and that, therefore, its offer to him was deemed finally rejected by him and no longer subject to acceptance. The court declared itself bound by the trial court's determination of this conflict in the evidence and concluded that there must be held to have been a "refusal to teach" which was "of course tantamount to a resignation." No hearing in the Supreme Court was requested. We shall not conceal our inability to see the conflict in the evidence deemed by the court to exist nor our view that the result reached was an unsatisfactory conclusion to an opinion otherwise luminous and instructive.

[7] Without attempting to draw any tenuous distinctions, we can only say that we do not subscribe to the view that a teacher is bound to abandon views held in good faith as to the compensation to which he or she is entitled, on pain of forfeiture of permanency of status, and that, in the case at bar, it is abundantly manifest that there was, on petitioner's part, no "refusal to teach" and no "resignation" for the board to consider.

The judgment is reversed.

SHENK, Justice (dissenting).

I am unable to concur. The appeal is from a judgment after a full and fair trial on the merits. The trial court made findings in favor of the respondents. These findings are in

part supported by uncontradicted evidence and otherwise by substantial though conflicting evidence. From these findings, it appears that the petitioner occupied a position as teacher in the district during the school year 1931-1932 at a salary of \$1,600. On April 18, 1932 the respondent board reduced the salaries for the following year of all teachers receiving that amount to \$1,557. On the following day, the petitioner was notified of the reduction. A contract calling for the reduced salary was prepared and presented to her for her acceptance and signature. She refused to accept or to sign the same and gave as the reason for her refusal that the salary was not right. At no time has she offered to teach for the salary specified in said contract and at all times has refused to do so. The respondents then placed another teacher in charge of the classes to which the petitioner had been assigned. The trial court concluded that, although the petitioner had attained the status of a permanent teacher, her conduct in refusing to teach at the salary fixed by the board was tantamount to a resignation.

It may be conceded that there is evidence on which contrary findings might have been based, but it is apparent to me that the court in the prevailing opinion has entered the domain of the trial court by testing the credibility of the witnesses and weighing the evidence. In my opinion the petitioner has not on the record justified a reversal of the judgment.

I concur: WASTE, C. J.



5 Cal.App.2d 523

ALLAN v. SOUTHWEST FINANCE CO.
OF CALIFORNIA.
Civ. 9466.

District Court of Appeal, Second District,
Division 2, California.
March 26, 1935.

I. Insurance Ⓒ33

Buyer of stock in insurance company, who agreed to reimburse seller for any amount seller would have to pay on a note payable to insurance company, on which seller was liable, could not offset amount of note against purchase price due seller.

2. Insurance Ⓒ33

On issue whether seller of stock in insurance company had breached agreement not to directly or indirectly engage in insurance business and to comport himself so as not to injure buyer, evidence sustained finding that seller had complied with agreement.

Evidence disclosed that seller's son was financially interested in an insurance corporation which had sold some insurance policies, that none of the policies had been sold to patrons of the insurance company or of seller, that seller had been seen around son's office and was interested in his son's affairs, that seller encouraged other stockholders of insurance company to file suits against buyer for alleged mismanagement of insurance company, and that seller's wife still owned stock in the insurance company.

3. Bills and notes Ⓒ540

Judgment for assignee of note held not erroneous, notwithstanding note was assigned for collection and was nonnegotiable on its face, since, by statute, rights of maker are fully safeguarded as to defenses or counterclaims (Code Civ. Proc. §§ 368, 440).

Appeal from Superior Court, Los Angeles County; James H. Mitchell, Judge.

Action by Robert M. Allan, Jr., against the Southwest Finance Company of California. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Black, Hammack & McWilliams, of Los Angeles, for appellant.

Irvin C. Louis, H. B. Pool, and Jessie Torrance, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment on a promissory note against defendant, from which the latter appeals.

The father of plaintiff, who was the payee of the note and who made the assignment for collection, was engaged in the insurance business as stockholder in a corporation known as Allan-MacMaster Company. He sold his common and preferred stock in said company to one Stearns, apparently acting at least in part for appellant corporation, for a consideration which was part cash, some shares of stock in appellant corporation, and a promissory note for \$5,000. The latter was not paid, and upon suit being brought judgment was rendered in behalf of this plaintiff for that amount. It is

appellant's claim that the trial court's findings adverse to various defenses and a cross-complaint were not warranted and should not be sustained.

Coincident with the sale of stock above described, a contract was entered into between Allan senior (plaintiff's assignor), Stearns, and appellant, by which Allan represented and guaranteed that the liabilities of his insurance company other than current items were all shown by the audit made about two months prior thereto. On such audit there did not appear an item of \$150 fee for the auditor and a contingent liability arising out of a note for \$7,500 signed by said insurance company and secured by a mortgage on some real property which had been sold by it subject to such mortgage. As to the auditor's fee, the finding of the trial court that it was merely a current account is obviously correct. The court further found that the note for \$7,500 was secured by a mortgage on real property worth at all times not less than \$11,000 and "that it is not true that Southwest Finance Company of California, a corporation, T. L. Stearns or Allan-MacMaster Co., a corporation, have suffered any damage through said liabilities," and that appellant "offered no evidence to prove or indicate that said Southwest Finance Company of California, a corporation, and/or Allan-MacMaster Co., a corporation, had suffered any damage by virtue of either of said obligations." Appellant has not directed our attention to any evidence which would effectively controvert such finding or justify any reduction of the judgment on that ground.

[1] It is next urged that an offset for \$10,000 should have been allowed. Allan had assumed liability for one-quarter of that amount on a note payable to said insurance company which had later come into the hands of appellant, but appellant in writing had agreed to repay to Allan any amount he might be required to pay out on account of said note. It could scarcely complain when the trial court held that since it was liable to reimburse him at once for any sum he might have to pay out toward meeting that note, it could not interpose such an obligation as an offset to the note which was the basis of plaintiff's complaint in this case.

[2] An effort was made by appellant to show a breach by Allan of the contract above referred to, which he signed when he sold the stock. It included an agreement not to engage in the insurance business directly or indirectly and to comport himself in such a

manner that detriment to appellant would not ensue. The findings of the trial court are expressly adverse to each contention of appellant, are supported by competent, and persuasive evidence and themselves fully support the judgment. An analysis of the evidence shows that the imputations of bad faith and misconduct are not supported. The first assertion is that Allan engaged in the insurance business and interfered with appellant's successful dealing with the clientele of the insurance company. In connection with this point it was established that this plaintiff, a law student, was personally and financially interested in an insurance service corporation which had sold perhaps half a dozen insurance policies, none of which was shown to have been sold to a patron of the insurance company or of Allan senior; and it was further testified that the latter had been seen around the office of such corporation and had manifested some interest in his son's affairs. The second assertion is that Allan damaged appellant by encouraging certain stockholders in the Allan-MacMaster Company to file suits against appellant for alleged conduct on the part of officers of appellant corporation with reference to certain of the insurance company's assets, which conduct, it was thought, would have caused the remaining stock of the latter company to become valueless, and that such suits were later dismissed. The contract contained no provision which would preclude Allan from giving what the trial court may have construed to be reasonable and timely advice to assist friends and clients who had bought stock in his company in reliance on his personal interest, and whom he considered to be financially imperiled by reason of some apparent indiscretion of appellant. From a showing that Allan's wife was still heavily interested financially in his former company, an inference might be drawn that he was likewise justified on her account in seeking to safeguard its assets.

[3] A final suggestion is made that plaintiff should not have been awarded judgment because he held the note by assignment for collection. Such a course is proper even though the instrument sued on is nonnegotiable on its face. *Greig v. Riordan*, 99 Cal. 316, 33 P. 913. The rights of appellant were fully safeguarded as to defense or counterclaim (Code Civ. Proc. §§ 368, 440), and no prejudice arose from such assignment. See 3 Cal. Jur. 295.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

5 Cal.App.2d 342

**RAPP v. LOS ANGELES CITY SCHOOL
DIST. et al.**
Civ. 9507.

District Court of Appeal, Second District,
Division 2, California.

March 19, 1935.

Rehearing Denied April 18, 1935.

1. Schools and school districts $\Rightarrow$ 141(5)

Statutory requirement that notice of incompetency be given permanent teacher by school board 3 months before filing of written charges *held* complied with, where notice was received by teacher on February 13 and charges were filed May 13, in view of rule for computing time by excluding first day and including last (School Code, §§ 5.652, 5.654, as added by St. 1931, p. 1396; Code Civ. Proc. § 12; Civ. Code, § 10; Pol. Code, § 12).

2. Schools and school districts $\Rightarrow$ 141(5)

Statutory requirement that permanent teacher be notified by registered mail not later than May 15 that he will be dismissed at end of school year unless he demands hearing on written charges of incompetency *held* complied with, where notice was deposited, registered, in United States mails, addressed to teacher at her last-known address, on May 15, even though notice was not received until May 16 (School Code, § 5.651, as added by St. 1931, p. 1395; Code Civ. Proc. § 1013).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by Agnes Imo Rapp for writ of mandate requiring the Los Angeles City School District and others to reinstate her as a permanent teacher. From a judgment denying the writ, petitioner appeals.

Affirmed.

H. E. Gleason, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Petitioner requested the trial court to issue a writ of mandate requiring respondents to reinstate her as a permanent teacher. The writ was denied, and she appeals, declaring that she was not properly served with statutory notices within the time required by law.

Chapter 7 of the School Code (Deering's Gen. Laws, 1931, vol. 3, p. 4187, Act 7519) deals with dismissals. Section 5.652 (as added by St. 1931, p. 1396) provides: "The board

shall not act upon any charges of incompetency filed by a member of the board or by any employee of the district unless the employee against whom such charge is filed shall have had notice of his incompetency given him by the governing board or by an authorized representative thereof at least three months prior to the date of the filing of the charges." Pursuant to that section respondents, on February 12, 1932, deposited in the United States mail, registered return receipt requested, a notice addressed to petitioner notifying her that she was incompetent. She received the notice the next day, February 13, and signed the receipt therefor. Other sections provide that, to dismiss a permanent teacher following the notice required by section 5.652, written charges must be filed and notice must be given the employee not later than May 15 that he will be dismissed at the end of the school year unless he demands a hearing. Such notice must be sent by registered mail (section 5.651 [as added by St. 1931, p. 1395]), and the hearing must be demanded within 30 days (section 5.654 [as added by St. 1931, p. 1396]) from the date of mailing of such notice. In this case the written charge was filed May 13, 1932, and notice of the same was sent to petitioner May 14, by registered mail, and was received May 16. No hearing on the charges was demanded by petitioner, and her dismissal became effective with the close of the school year.

[1] It is now urged that notice of incompetency was not given to petitioner 3 months prior to filing of the written charges, although such notice was actually received by her on February 13 and the charges were not filed until May 13. It would appear that the rule for computation of time, to wit, by excluding the first day and including the last, would apply. Code Civ. Proc. § 12; Civ. Code, § 10; Pol. Code, § 12. We further observe that the 30 days allowed by section 5.654 within which petitioner might demand a hearing did not start to run until the date of mailing of such notice on May 14.

[2] Petitioner directs our attention to section 5.651, which provides that "said notice [of the written charges], which must be given not later than the fifteenth day of May in any school year, must be in writing and sent by United States registered mail to the said permanent employee at his last known address." She suggests that such notice is not complete when deposited in the mail nor until it is received by the employee, and that, since

It was not received by her until May 16, although mailed 2 days earlier, it did not conform to the provisions of the section cited, and is therefore of no avail. It would seem that the language above quoted should be construed to mean that a written notice of the charges must be deposited, registered, in the United States mail, addressed to the employee at his last-known address not later than May 15. If it were intended to require that it must be delivered to or received by the employee by that date, it would have said so. The interpretation we prefer would be in harmony with the provisions of the Code of Civil Procedure, § 1013, which relates to service by mail and states that it is complete at the time of the deposit, with an allowance of time for acts to be done by the other party pursuant thereto. In this case the only act to be done by petitioner pursuant to such notice was to demand a hearing on the charges. No such demand was made.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



LEVY v. DREW.*

Civ. 1353.

District Court of Appeal, Fourth District,
California.

March 22, 1935.

Rehearing Denied April 17, 1935.

Hearing Granted Supreme Court
May 20, 1935.

1. Judgment ⇐401

Where judgment for plaintiff has been vacated by trial court, defendant is entitled to restitution of all things taken from him under judgment.

2. Judgment ⇐401

Judgment creditor had no right to retain money collected under execution after judgment on which execution was issued had been vacated, on ground that he caused satisfaction of judgment to be entered after he had received money from sheriff, since there remained nothing to satisfy after judgment was vacated.

3. Bankruptcy ⇐154

In suit by bankruptcy trustee against judgment creditor who obtained money under execution on judgment which was subsequently vacated, judgment creditor held not

entitled to offset his claim for services rendered to bankrupt, since money was not voluntarily paid to be applied on particular debt owed.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Nathan Levy, as trustee in the matter of California Olive Growers, a bankrupt corporation, against A. M. Drew. From an adverse judgment, plaintiff appeals.

Reversed.

Farnsworth, Burke & Maddox, of Visalia (James K. Abercrombie, of Visalia, of counsel), for appellant.

F. C. Huebner and Arthur H. Drew, both of Fresno, for respondent.

MARKS, Justice.

This is an appeal by plaintiff from a judgment rendered in an action wherein he sought to recover from defendant the sum of \$3,035.50. This sum had been collected by defendant under an execution issued on a judgment rendered in his favor in an action against the California Olive Growers, Inc., a corporation. We will refer to the California Olive Growers, Inc., as the corporation. The facts are not in dispute.

A. M. Drew, an attorney at law, performed legal services for the corporation prior to September 19, 1927. On that day he commenced an action in the superior court of Fresno county to recover \$3,025.50 from the corporation and caused its bank account to be attached. Summons was served and the parties entered into negotiations for a settlement of the claim. Pending these negotiations the default of the corporation was taken, judgment entered, and execution levied under which \$3,035.50 was collected and paid to Drew. Thereafter the judgment was vacated, the default opened, and an answer filed. The case was not brought to trial and was dismissed for lack of prosecution on September 22, 1933.

On March 27, 1928, the corporation was adjudged an involuntary bankrupt and plaintiff was appointed, qualified, and acted as its trustee. The scheduled debts of the corporation totaled \$211,924.51, and its scheduled assets \$17,787.45.

On November 15, 1929, plaintiff brought this action to recover the \$3,035.50 which defendant had collected under the execution. Defendant maintains that he is entitled to retain

the money collected under the execution as payment of his bill for services rendered. It was stipulated at the trial that the reasonable value of Drew's services to the corporation was \$3,025.50.

[1, 2] It is well settled in California that when a judgment is reversed on appeal the appellant is entitled to restitution of all things taken from him under the judgment. After reversal, the respondent stands in the position of a trustee of appellant of the property obtained under the judgment. Restitution may be sought in the same or in an independent action. *Ward v. Sherman*, 155 Cal. 287, 100 P. 864; *Asato v. Emirzian*, 177 Cal. 493, 171 P. 90. The same rule should apply where a judgment has been vacated by a trial court. A judgment, when vacated, cannot be effective for any purpose. *Lapique v. Plummer*, 50 Cal. App. 88, at page 94, 195 P. 293; *Sichterman v. R. M. Hollingshead Co.*, 117 Cal. App. 504, 4 P.(2d) 181; *Thomas v. Lavery*, 125 Cal. App. 666, 14 P.(2d) 158; *Clarke v. Baird*, 98 Cal. 642, 33 P. 756. We therefore conclude that defendant had no right to retain the money collected under the execution after the judgment upon which it was issued had been vacated. He urges that he caused satisfaction of the judgment to be entered after he had received the money from the sheriff. This can avail him nothing as there remained nothing to satisfy after the judgment was vacated.

There remains for determination the question of defendant's right to offset his claim for services rendered against the claim of the plaintiff for restitution of the money unlawfully held by defendant. To permit defendant to offset his claim would give him a preference over other general creditors of the bankrupt by permitting him to be paid in full while other creditors in the same class would receive but percentages of their demands.

The rule is consistently applied in the federal courts that when a debtor, prior to bankruptcy, voluntarily places in the hands of his creditor assets for the particular purpose of extinguishing a debt, and bankruptcy occurs, the creditor can offset his demand against the claim of the trustee in bankruptcy for a return of the assets to the bankrupt estate. It is equally well settled that the unauthorized possession of funds of the bankrupt can give the creditor no right to apply them to the payment of his own claim to the prejudice of the rights of other creditors. *Emerson v. Fisher* (C. C. A.) 246 F. 642; *Lehigh Valley Coal Sales Co. v. Maguire* (C. C. A.) 251 F. 581;

Alvord v. Ryan (C. C. A.) 212 F. 83; *In re Interborough Consol. Corp.* (C. C. A.) 288 F. 334, 32 A. L. R. 932; *Parker State Bank v. Pennington* (C. C. A.) 9 F.(2d) 966; *In re Gans & Klein* (D. C.) 14 F.(2d) 116; *Cook County Nat. Bank v. United States*, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537; *Hanover Nat. Bank of New York v. Suddath*, 215 U. S. 122, 30 S. Ct. 63, 54 L. Ed. 120.

[3] In the instant case the money was not voluntarily paid to defendant by the corporation, but was forcibly seized by the levy of an execution, nor was it voluntarily handed over to be applied on the particular debt owed to defendant. When his judgment was vacated, defendant's possession of the money became illegal and he should have restored it to his debtor. It follows that defendant cannot offset the amount of his claim against the suit of the trustee in bankruptcy for the money which he unlawfully retained but must restore it and take his place among the general creditors of the bankrupt estate. Had there been no adjudication of bankruptcy, and had the corporation been suing, the defense of offset or counterclaim might have been available to defendant, but not under the circumstances here shown.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



5 Cal.App.2d 436

Ex parte SALKIN.
Cr. 2696.

District Court of Appeal, Second District,
Division 1, California.
March 22, 1935.

1. Contempt ☞79

Court could direct imprisonment of defendant until compliance with order directing him to divide community property (Code Civ. Proc. § 1219).

2. Contempt ☞79

Provision of Penal Code forbidding commitment in excess of one year of persons sentenced to confinement in county jail held not to require release of defendant after year's imprisonment in county jail under contempt order directing imprisonment until compliance with order directing defendant to di-

vide community property, since defendant had never been sentenced, and since Code specifically provided that it should not affect power of a tribunal to punish for contempt (Code Civ. Proc. § 1219; Pen. Code, § 11, and § 19a, as added by St. 1933, p. 2217, § 2).

Proceeding in the matter of the application of Oscar Salkin for a writ of habeas corpus.

Writ heretofore issued discharged, and petitioner remanded to custody of sheriff.

Gladys Towles Root, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

PER CURIAM.

The question submitted to this court for its determination herein is whether imprisonment of petitioner in the county jail of the county of Los Angeles for a longer period than one year is legal, where it appears that such imprisonment has resulted from an order made by the trial court by reason of its adjudication of the guilt of petitioner in a contempt proceeding to the effect that, because of the continued neglect and refusal of petitioner to comply with a former judgment made by said court in an action wherein petitioner was ordered to divide equally between himself and the plaintiff in said action all community property of the parties to said action which was in the possession of the petitioner, he be confined in the county jail of the county of Los Angeles "until he shall have complied with said judgment. * * *

It will thus be noted that petitioner was not committed for any fixed period of time as punishment for the commission of the contempt of court of which he was guilty, but that his authorized imprisonment therefor was only as long as he continued in his disregard and refusal to obey the order of the court. In other words, by virtue of his own future conduct in the premises, either in failing to comply, or in complying, with the judgment of the court, his term of imprisonment began and ended.

As far as is pertinent to this inquiry, section 19a of the Penal Code, as added by St. 1933, p. 2217, § 2, provides that: "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of pro-

bation, or for any reason, be committed for a period in excess of one year. * * *

[1] On the other hand, the power of the court in the premises is attested by the ruling in the case of *Burns v. Superior Court*, 140 Cal. 1, 73 P. 597, wherein it was held that, aside from statutory authority therefor, a court of general jurisdiction has inherent power to punish for contempt persons who obstruct or interfere with its authority; and in *Ex parte Joutsen*, 154 Cal. 540, 98 P. 391, it was ruled that (syllabus): "Under section 1219 of the Code of Civil Procedure, a husband who is found by the court to have the present ability to comply with an order directing him to pay alimony, may be ordered to be imprisoned until he has complied with it."

[2] On casual consideration of section 19a of the Penal Code, its language might seem sufficiently comprehensive to embrace an imprisonment which might arise from a commitment issued in a proceeding on an adjudication of contempt of court. But in view of the provisions of section 11 of the same Code, to the effect that "this code does not affect any power conferred by law upon any * * * tribunal * * * to impose or inflict punishment for a contempt, * * *" it becomes manifest that the legislative intent in the use of the broad language employed in section 19a at least is subject to conditions contained within, and made a part of, the commitment, by virtue of which the term of imprisonment to be served by the contemnor either depends, or may depend, upon the will or the future conduct of the contemnor in acceding to, or in complying with, such attached conditions. It is obvious that before one may become entitled to the benefit of the provisions of section 19a of the Penal Code, it must appear that theretofore he was "sentenced to confinement in a county or city jail," etc. Strictly speaking, petitioner never was so sentenced. In effect, the order was that "until he shall have complied with said (former) judgment," etc., he be confined in the county jail. In terms, other than a provision for a conditional incarceration, there was no sentence. The order for the confinement of petitioner became operative or effective only upon petitioner's own choosing; and by the same means, such confinement was to be terminated. But by numerous decisions cited in volume 5 of *California Jurisprudence*, at page 931, in substance it has been held that where a fine has been imposed as punishment for a contempt, the court has power to enforce the

payment of such fine by imprisonment until the fine be paid, notwithstanding the fact that such term of imprisonment may exceed the statutory limit of five days. Likewise, in the case of *Ex parte Karlson*, 160 Cal. 378, 117 P. 447, Ann. Cas. 1912D, 1334, where in the situation was analogous to that here presented, it was ruled that: "Section 1205 of the Penal Code, providing that imprisonment as a means of enforcing the payment of a fine shall not 'extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted,' has no application to cases of contempt, because section 11 of that code expressly declares that 'this code does not affect any power conferred by law upon any * * * tribunal, or officer, to impose or inflict punishment for a contempt.'"

It is ordered that the writ heretofore issued herein be and it is discharged; furthermore, that petitioner be and he is remanded to the custody of the sheriff of Los Angeles county.



5 Cal.App.2d 498

PONSETTI et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
Civ. 9743.

District Court of Appeal, First District,
Division 2, California.
March 25, 1935.

Hearing Denied by Supreme Court
May 24, 1935.

Master and servant ☞367

Itinerant expert machinist furnishing his own tools and charging bakers for time and materials used in repairing dough mixer held "independent contractor" rather than "employee," precluding compensation for injury occurring when machinist, having repaired mixer, voluntarily and unnecessarily attempted to grease gears (St. 1917, p. 835, § 8 (b)).

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

Petition by Modest Ponsetti and others, doing business under the copartnership name of the French Commercial Bakery, to review an award granted by the Industrial Accident

Commission to A. R. Rente, claimant, in a proceeding under the Workmen's Compensation Act.

Award annulled.

George Gelder, of Oakland, for petitioners.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

The individual petitioners operated a bakery under the partnership name. They engaged one Rente to repair a dough mixer used in the course of their business. Rente repaired the dough mixer and then, of his own accord, attempted to grease the gears. These gears were of a kind that did not require greasing and petitioners gave Rente no instructions or suggestions to work upon them. While engaged in working on the gears, Rente incurred injuries for which the respondents found petitioners liable to pay compensation. In their petition for a review of this award, the petitioners rely mainly on the point that Rente was not an employee.

Their contention must be sustained. Rente was an itinerant, but expert, machinist, who furnished all his own tools, kept his own time, and charged petitioners for his time and the materials which he furnished and used in the work. This was his business or occupation. He had been engaged by others to repair machinery and had previously been called in by petitioners for similar jobs. He was not paid as a workman, but always rendered a bill in which he listed the hours of service and the cost of materials furnished. The petitioners did not at any time exercise or reserve the right to exercise any shadow of control over his work. They were all bakers who knew nothing about the repair of such machines and could not have controlled Rente's operations if they had had the right to do so. It was, no doubt, because of their want of knowledge and experience in mechanical repairs that they called in an expert machinist, just as one would summon a plumber, an auto mechanic, or an electrician to repair machinery upon his own time and in the exercise of his own knowledge and skill.

Here the contract was made for a specific result with one who followed an independent employment or occupation of a highly technical character. He comes under the express definition of an independent contractor found in section 8(b) of the Workmen's Compensation Act (St. 1917, p. 835) as interpreted in

Moody v. I. A. C., 204 Cal. 668, 672, 269 P. 542, 60 A. L. R. 299; Fidelity & Casualty Co. v. I. A. C., 191 Cal. 404, 407, 216 P. 578, 43 A. L. R. 1304; Becker v. I. A. C., 212 Cal. 526, 531, 298 P. 979; Counihan v. Lufstufka Bros. & Co., 118 Cal. App. 602, 605, 5 P.(2d) 694; Lillibridge v. I. A. C. (Cal. App.) 40 P. (2d) 856. Under the admitted facts of the case, it follows that respondents were without jurisdiction to make the award complained of.

The award is annulled.

We concur: STURTEVANT, J.; SPENCE, J.



5 Cal.App.2d 187

PEOPLE v. FITZWATER.

Cr. 2655.

District Court of Appeal, Second District,
Division 2, California.

March 8, 1935.

1. Criminal law ☞304(9)

Court takes judicial notice that "Dyer Act" within information charging petty theft with prior conviction of felony under Dyer Act is the National Motor Vehicle Theft Act (National Motor Vehicle Theft Act, 18 USCA § 408; U. S. Cr. Code § 335, 18 USCA § 541).

2. Criminal law ☞1202(1)

Words "any felony," within statute providing that person who having been convicted of any felony commits petty theft is punishable by imprisonment in state prison, *held* not limited by section providing that person who has been convicted in foreign jurisdiction of offense which if committed within state would be punishable by imprisonment in state prison is punishable for subsequent crime in manner provided by statute, so as to exclude proof of conviction under National Motor Vehicle Theft Act because of necessary interstate element (Pen. Code, §§ 667, 668; National Motor Vehicle Theft Act, 18 USCA § 408; U. S. Cr. Code § 335, 18 USCA § 541).

3. Criminal law ☞1202(1)

In petty theft prosecution, proof of prior conviction of felony under National Motor Vehicle Theft Act *held* properly admitted as against contention that, under statute characterizing as felony any offense of which accused has been convicted in foreign jurisdiction, whether denominated therein as felony

or misdemeanor, which if committed within state would be punishable by imprisonment in state prison, offense under National Motor Vehicle Theft Act could not be committed within state, where such act and California Vehicle Act denounce same general conduct, and each defines such conduct as a felony (Pen. Code §§ 667, 668; St. 1931, p. 2133, § 146; National Motor Vehicle Theft Act, 18 USCA § 408; U. S. Cr. Code § 335, 18 USCA § 541).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

George R. Fitzwater was convicted of petty theft with prior conviction of a felony, and he appeals.

Affirmed.

Frederic H. Vercoe and William B. Neeley, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

WILLIS, Justice pro tem.

This is an appeal from a judgment of imprisonment in San Quentin founded upon conviction of petit theft with prior conviction of a felony under the "Dyer Act." Appellant contends that under the provisions of sections 667 and 668 of the Penal Code it was error to admit proof of the prior conviction charged and to enter judgment adjudging him guilty of a felony with imprisonment in a state prison.

At the outset of consideration of this case we are embarrassed by the declaration of counsel on each side that a decision contrary to his respective contention will be a "travesty on justice." Despite such extravagance of argument and the disturbing effect thereof on the calm of judicial inquiry, we shall carry on, hew to the line, and let the chips fall where they may.

By information appellant was charged with the crime of "petit theft with prior conviction of a felony, to wit, violation of the Dyer Act, a felony," and service of a term therefor in a penal institution; the conviction being alleged to have occurred in the District Court of the United States in and for the Southern District of California on or about January 16, 1924. At the trial the guilt of appellant of the charge of petit theft was established, and there was offered and, over his objection, received in evidence a certified copy of the record of conviction of appellant in the United States court above mentioned of feloniously causing a motor vehicle to

be transported from Oakland, Cal., to Los Angeles, and thence out of the jurisdiction of the United States and said court to the city of Tia Juana, Baja California, in the Republic of Mexico, the defendant then and there well knowing the said motor vehicle to have been stolen and being then and there not the property of defendant, and the defendant not having the consent or permission of the owner of said motor vehicle to take, transport, or cause to be transported said motor vehicle from the county of Los Angeles to the said city of Tia Juana. It was admitted that appellant served a term of imprisonment in a penal institution under this conviction.

[1] Section 667 of the Penal Code provides that: "Every person who, having been convicted of any felony either in this state or elsewhere, and having served a term therefor in any penal institution, commits petit theft after such conviction, is punishable therefor by imprisonment in the state prison not exceeding five years." We take judicial notice that the "Dyer Act," so called in the information herein, is the National Motor Vehicle Theft Act, which in its pertinent parts provides that whoever shall transport or cause to be transported from one state to another or to a foreign country a motor vehicle, knowing the same to have been stolen, is guilty of a felony. 18 USCA § 408; U. S. Cr. Code § 335 (18 USCA § 541). Considering and applying the language of section 667 of the Penal Code in its literal sense and meaning, it appears clearly that there was no error in charging and admitting proof of the previous conviction of violation of the National Motor Vehicle Theft Act. For such consisted in proof of a previous conviction of a felony in this state, to wit, in the District Court of the United States in and for the Southern District of California.

[2] Appellant, however, contends that section 667 must be construed with the provisions of section 668 of the Penal Code, and that such construction limits the words "any felony" in section 667 to offenses which, if committed within this state, would be punishable by the laws of this state by imprisonment in a state prison; and that because of the interstate element necessary to complete the offense defined in the National Motor Vehicle Theft Act, such offense could not be committed within this state. We have read and considered these sections together and find no limitation of the expression "any felony" as used in section 667 by the language of section 668, but rather an addition to the scope thereof by characterizing as a felony

any offense of which the accused has been convicted in any other state, government, or country, whether denominated therein as felony or misdemeanor, which, if committed within this state, would be punishable by imprisonment in the state prison. However, and regardless of the conclusion just above reached, we do not agree with appellant's contention that under the terms of section 668 a violation of the Dyer Act may not be properly pleaded and proved as a previous conviction of felony, under section 667.

The offense defined in the so-called Dyer Act is the transporting from one state to another or to a foreign country of a motor vehicle, knowing the same to have been stolen. By section 146 of the California Vehicle Act (St. 1923, p. 564, § 146, as amended by St. 1931, p. 2133) it is provided that any person who shall drive or take a motor vehicle not his own, without the consent of the owner and in his absence, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, shall be guilty of a felony. It is plain that both acts denounce the same general conduct of persons in respect to driving or transporting motor vehicles belonging to another without the owner's consent. Driving a stolen automobile, with knowledge that it has been stolen and without the owner's consent, within the state and up to the state line, would constitute a felony under the state law. The same acts begun within the state and continued over the state line would constitute a felony under the Dyer Act. The same offense is described in both cases; the single difference being an item of jurisdiction of the respective courts of the state and the United States to punish therefor. It has been held that the Harrison Narcotic Act (26 USCA §§ 211, 691 et seq.) and the State Poison Act (St. 1907, p. 124, as amended) denounce the same general conduct, and that a conviction under the former act may be pleaded and proved as a previous conviction under section 668 of the Penal Code. *People v. Bigelow*, 94 Cal. App. 28, 270 P. 460. In the case of *People v. Albritton*, 110 Cal. App. 188, 294 P. 76, the decision in *People v. Bigelow*, supra, was approved, but it was held that a previous conviction under the Jones-Miller Act of Congress (42 Stat. 596, as amended), relating to customs laws, could not be properly pleaded and proved under section 668 of the Penal Code, because it was for conviction of an offense not denounced by the statutes of this state, there being no custom laws whatever in California.

[3] We are satisfied that the National Motor Vehicle Theft Act and section 146 of the California Vehicle Act denounce the same general conduct or acts, and that each defines such conduct and acts as a felony. It follows that there was no error in charging and proving the previous conviction of appellant of violation of the so-called Dyer Act, as charged in the information.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 531

HELD et al. v. JIRDON et al.

Clv. 9602.

District Court of Appeal, Second District,
Division 2, California.

March 27, 1935.

Automobiles ⇨244(10, 14)

Evidence held not to show negligence of truck driver for proceeding near center of highway when collision occurred with automobile at night putting out all lights on truck and trailer, and for failure to warn another automobile which ran into trailer shortly after first collision.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Charles Held and another against W. H. Jirdon and others. Verdict in favor of plaintiffs. From orders denying motions of defendants for judgment notwithstanding the verdict, they appeal.

Reversed and remanded, with directions.

Kidd, Schell & Delamer, of Los Angeles, for appellants.

Claude F. Weingand and Reginald I. Bauer, both of Los Angeles, for respondents.

FRICKE, Justice pro tem.

Appeal by defendants from orders denying motions for judgment notwithstanding the verdict and from the order denying motions for a substituted or directed judgment in their favor, though granting defendants a new trial.

On the night of June 19, 1931, a truck with a trailer attached, owned by appellant La Rue and driven by his employee, appellant Saunders, within the scope of his employment, was proceeding easterly on the right-hand side of Mint Canyon highway at about seventeen miles per hour. A Dodge automobile came around a curve from the east, traveling near the center of the road at a high rate of speed, passed to the wrong side of the road, and struck the front end and side of the truck, doing considerable damage including the destruction of the truck's storage battery, making it impossible to drive the truck and putting out all lights on the truck and trailer. Respondents, in a Ford car and coming from the west, ran into the trailer shortly after the first collision. This appeal involves the questions whether the truck driver was guilty of negligence and whether the Ford driver was guilty of contributory negligence, appellants contending that there was absolutely no evidence upon which the verdict could be sustained and that, therefore, the motions for judgment notwithstanding the verdict should have been granted.

So far as the collision between the truck and the Dodge car is concerned, respondents wholly failed to show that it was due to the negligence of the driver of the truck. Respondent's argument that the truck was not close to the right-hand edge of the highway, but near the center of the road when the collision occurred, and therefore was proceeding unlawfully, fails to find support in the position of the truck and trailer after the second collision. Appellants were therefore not chargeable with negligence because, after the collision with the Dodge car, the truck and trailer were momentarily left on the highway.

As to the second collision, is there any evidence that it was the proximate result of negligence on the part of the driver of the truck? What should the driver, as a reasonably prudent individual, have done which he did not do? The truck could not be moved, and the means of lighting the lights had been destroyed. The only remaining possible negligence would be the failure of the truck driver or his helper to warn vehicles approaching the wreck particularly the automobile of respondents. The only proof as to the time which elapsed between the two accidents came from the driver of the truck and his helper. Their testimony at the trial was to the effect that the collisions so closely followed one another that there was no oppor-

tunity to warn respondents. Respondents rely upon the testimony of an occupant of the Ford car who testified that she had asked the driver of the truck why he was not signaling traffic and that the driver replied that the accident had "happened just a few minutes ago and they didn't have time." Respondents argue from this that since "a few minutes" had elapsed this was some evidence that an opportunity to warn traffic existed. The fallacy of this argument lies in the fact that it depends upon picking out a part of the statement and disregarding the remainder. The effect of the introduction of this statement by respondents, taking the statement as a whole as we must, is that respondents themselves proved that there was not sufficient time between the two collisions to permit of any signaling. Respondents have entirely failed to prove any negligence on the part of the driver of the truck or his assistant.

The orders denying motions of defendants for judgment notwithstanding the verdict are reversed, and the cause is remanded to the trial court, with directions to order the entry of judgment for all defendants notwithstanding the verdict.

We concur: STEPHENS, P. J.; CRAIL, J.



WILLSON v. MUNICIPAL BOND CO. et al.*
Civ. 9410.

District Court of Appeal, Second District,
Division 2, California.
March 27, 1935.

Rehearing Denied April 17, 1935.

Hearing Granted by Supreme Court
May 24, 1935.

1. Fraud ☞20

Plaintiff's right to recover for alleged fraud in property exchange depends primarily on existence of false representation accepted as true, inducing plaintiff to consummate exchange which he would not otherwise have made.

2. Fraud ☞11(2)

Where landowner agreed with broker to exchange land for public improvement bonds, and friend of landowner examined lands subject to taxation to pay bonds, broker's statement that bonds were worth 100 cents on the dollar held not fraudulent representation, but merely expression of opinion or belief that

bonds were amply secured and would be paid in full.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by O. C. Willson against the Municipal Bond Company, H. H. Cotton, M. D. Fox, and another. Judgment for plaintiff, and defendants named appeal.

Reversed.

William H. Neblett and John G. Sobieski, both of Los Angeles, for appellants Municipal Bond Co. and H. H. Cotton.

Wingert & Bewley, of Whittier, for appellant M. D. Fox.

Hill, Morgan & Bledsoe, Benjamin F. Bledsoe, Charles P. McCarthy, and Henry M. Lee, all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appeal from the judgment on verdict for plaintiff.

Plaintiff-respondent Willson owned a piece of improved real property in Beverly Hills, subject to trust deeds, with a new exchange value as fixed by himself of \$85,000. About June, 1930, Willson discussed with one Irwin, a real estate man, his desire to dispose of his property. Later Irwin told Willson that he had contacted a downtown broker (M. D. Fox hereinafter referred to) who had said he could secure some improvement bonds for the equity. About July 1, 1930, Willson first met Fox. The meeting was in the escrow department of the Bank of America, at the suggestion of Irwin, and there were also present the escrow clerk, Irwin, and a friend of Willson's named Hauschild. At that time Fox stated he had examined Willson's property and would give him \$85,000 worth of San Diego county improvement bonds for it. Willson stated he would have to be assured as to the value of the bonds and that he would have to make a loan on them. Fox said he could get the loan and that the bonds were worth 100 cents on the dollar. Later in the conversation Fox said he could secure a loan of \$27,500 on the bonds. Escrow instructions were drafted and signed by Willson and Fox as the escrowing parties, in accordance with their previous discussions.

On the occasion of the first meeting Willson agreed that the commission on the deal could be divided between Irwin and Fox. The latter secured a loan on the security of the bonds, the note being signed by an employee in his office and in effect was guaran-

teed by Municipal Bond Company. This was the first time the name of this company appeared in the transaction, so far as Willson was concerned. It appears, however, that the bonds were really the property of the Municipal Bond Company, which turned them over to Fox for the purpose of closing the deal, and this company and not Fox was the real party in interest in the deal with Willson. Before the escrow was closed, Willson had requested his close friend, Hauschild, to look at the San Diego property covered by the bonds; and, after doing so, Hauschild reported to Willson that the location and description of the real property was as Fox had given it and congratulated Willson on the fine deal he had made. Several witnesses testified that the bonds had no market value. One of the witnesses as to the value of the bonds was not permitted by the court to answer whether they had any actual value as distinguished from market value, and the court excluded proffered evidence of appellants of the actual value of the bonds. On the theory that he had been induced to make the exchange of properties by a false representation, the plaintiff recovered at the hands of the jury a verdict of \$59,360.92, the difference between the value of what he parted with and what he received, including the proceeds of the \$27,500 loan.

[1] Respondent's right to a recovery depends primarily upon the existence of a false representation which he accepted as true, which induced him to consummate the deal and without which he would not have made the exchange. The first question for decision therefore is: Was the statement of Fox that the bonds were worth 100 cents on the dollar such that, if false but relied upon as true by respondent, it can be made the basis of the recovery of damages herein, or was the statement of Fox merely the expression of his opinion or belief and hence insufficient to support an action for fraud and deceit?

[2] It must be noted that Fox did not state the market value of the bonds, nor that there was a market for them; nor did he state that the bonds could then and there be turned into their face value in cash. The nature of the bonds, the time and manner of their payment, and the source of the funds for the payment thereof was patent upon the face of the bonds, and the law relating to public improvement bonds (The Acquisition and Improvement Act, also known as the Mattoon Act [St. 1925, p. 849, as amended]), under which they were issued and by which they were controlled. The lands covered by

the bonds and their location were correctly described by Fox to Willson. Hauschild, Willson's friend, who looked at the property, agreed with Fox's description and expressed himself as believing Willson was making a good deal. The nature of the bonds was such that, to a degree at least, the full payment of their obligation depended upon future happenings. Respondent could as readily have ascertained the value of the bonds, so far as it was then ascertainable, as Fox; both knew the nature of the lands in San Diego subject to taxation to pay the bonds; both must have known that the payment of the bonds depended upon future prosperity and would be affected to a degree at least by a depression. The statement of Fox amounted to no more than the expression of an opinion or belief that the obligation of the bonds would be paid in full, and that the bonds were amply secured. Such statements will not furnish the basis of an action for damages in the event that the obligation turns out to be of a value less than that expressed in the opinion. See *People v. Gibbs*, 98 Cal. 661, 33 P. 630; *Lion v. McClory*, 106 Cal. 623, 40 P. 12; *Gleason v. McPherson*, 175 Cal. 594, 597, 166 P. 332; *Herrill v. Rugg*, 114 Cal. App. 492, 300 P. 140; *Pease v. Thornburg*, 118 Cal. App. 53, 4 P.(2d) 618.

We are not unmindful of the cases in which it has been held that under some circumstances a false statement as to the value of property ceases to be mere opinion and becomes a false representation upon which an action for fraud and deceit or for rescission may be predicated. These cases are, however, distinguished in that the misrepresentations were made as ones of fact, with intent to deceive, where the information in the possession of the representor was such as to render his statement as to value one which he knew to be false, where the value of the property did not depend upon what the future might bring and where the circumstances evidenced the desire to take an undue advantage and the representor had knowledge not available to the person to whom the representations were made. See discussion in *Dunshee v. Boadway*, 119 Cal. App. 678, 653 et seq., 7 P.(2d) 325.

There being as a matter of law no fraudulent representation, such as is necessary to sustain an action for fraud and deceit, there is no occasion to discuss the other points raised on this appeal.

The judgment is reversed.

We concur: STEPHENS, P. J.; CRAIL, J.

5 Cal.App.2d 480

SHELL OIL CO. et al. v. SUPERIOR COURT
IN AND FOR SONOMA COUNTY
et al.

Civ. 5243.

District Court of Appeal, Third District,
California.

March 23, 1935.

Hearing Denied by Supreme Court
May 20, 1935.

Costs ☞ 118

Statute requiring plaintiff in libel suit to file undertaking in stated sum to pay costs and charges awarded against him, not exceeding such sum, held not to require bond fully compensating defendant or any number of defendants for all costs and charges incurred by them (Gen. Laws 1931, Act 4317; Civ. Code, § 14).

Appeal from Superior Court, Sonoma County.

Proceeding by the Shell Oil Company and others to recall and modify a peremptory writ of prohibition, issued by the Court of Appeal to the Superior Court of the State of California, in and for the County of Sonoma, and Hilliard Comstock, Judge of Department 2 thereof [37 P.(2d) 1078].

Peremptory writ recalled and modified.

McCutchen, Olney, Mannon & Greene, of San Francisco, and Geary & Geary, C. J. Tauzer, and Barrett & McConnell, all of Santa Rosa, for petitioners.

Toland C. McGettigan, of San Francisco, for respondents.

PER CURIAM.

This is a petition to recall and modify the peremptory writ of prohibition which was previously issued by this court restraining the superior court of the state of California in and for the county of Sonoma from proceeding to try the libel suit entitled "Kidwell et al. v. Shell Oil Company et al.," number 20583, which is pending in that county, until adequate bonds are supplied by the plaintiffs as required by Statutes of 1871, p. 533, as amended by St. 1880, p. 81, Act 4317, volume 2, Deering's General Laws of California 1931.

Upon a petition for a writ of prohibition this court determined that a single \$500 bond furnished by all of the plaintiffs in the consolidated libel suits was inadequate to comply with the provisions of the statute, and upon the contrary that at least a bond of \$500 was required to be filed by each plaintiff. Shell Oil Co. et al. v. Superior Court of the State of California in and for the County of

Sonoma et al. (Cal. App.) 37 P.(2d) 1078. Inadvertently the peremptory writ of prohibition was issued in that proceeding restraining the court from further proceedings in that case until adequate bonds in the amount of \$500 shall have been furnished therein by each plaintiff to secure the costs and charges which may be awarded "to each of the defendants."

Upon this hearing to recall and modify the peremptory writ of prohibition, it is contended by the plaintiffs in the libel suit that the statute does not require a \$500 bond to secure the costs and charges which may be awarded to each separate defendant in the suit. This court did not hold that a \$500 bond must be filed by each plaintiff in the consolidated suits to separately secure each of the defendants in those suits to the full amount of \$500. The defendants argue very convincingly that a single \$500 bond furnished by each plaintiff to all of the defendants as a group may be insufficient to secure the actual costs and charges to which they may be entitled in the event that any of them may recover a judgment in their favor or that the action may be dismissed as to any such defendant, or as to all of them.

We are, however, persuaded that the statute does not require the furnishing of a bond which, under any and all circumstances, will fully compensate a defendant, or any number of defendants, who may be joined in a libel suit, for all costs and charges which they may incur. The amount of a statutory bond which is required of each plaintiff in a libel suit, who instituted a separate or a consolidated action, has been arbitrarily fixed by the Legislature at the sum of \$500, as evidence of good faith in prosecuting the suit. The statute leaves no discretion on the part of the court to fix the amount of a bond in a libel suit so as to absolutely guarantee a defendant, or each defendant, reimbursement of all the costs and charges which he may incur in the suit. There is no language in the statute from which we may reasonably infer that when a libel suit is commenced by a plaintiff against several defendants jointly that a separate \$500 bond shall be required to secure the costs and charges of each defendant. The bond which is required in this character of a case is strictly statutory. The courts are bound by the provisions of the statute. The statute provides in that regard: "In an action for libel or slander the clerk shall, before issuing the summons therein, require a written undertaking on the part of the plaintiff in the sum of five hundred (500) dollars, with at least

two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action be dismissed or the defendant recover judgment, that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, or on an appeal, not exceeding the sum specified in the undertaking. An action brought without filing the undertaking required shall be dismissed."

It will be observed that the language of the statute specifically limits the liability of the sureties on the bond required to an amount "not exceeding the sum specified in the undertaking." It is reasonably conceivable that a single defendant against whom a libel suit is instituted may incur costs and charges greatly in excess of the sum of \$500. Yet the statute does not contemplate that the sureties on the bond shall be liable for more than that limited sum. We must assume that the Legislature therefore did not intend to require a bond that would necessarily be adequate to cover all costs incurred by one or more defendants in a libel suit. We are satisfied that section 14 of the Civil Code, which declares that the use of the singular number includes the plural, applies to the term "defendant" as it is used in the statute requiring a plaintiff in a libel or slander suit to file a \$500 bond to secure the payment of costs and charges incurred by "the defendant" in the event of a recovery of judgment, a dismissal of the case or upon appeal, and that the statute requires no other or greater bond than the amount specified even though several defendants may have been joined in the action.

The peremptory writ of prohibition is therefore recalled and modified to conform to the preceding opinion.



5 Cal.App.2d 520

PHILLIPS v. CUCCIO.

Civ. 9403.

District Court of Appeal, Second District,
Division 2, California.

March 26, 1935.

Hearing Denied by Supreme Court
May 24, 1935.

1. Automobiles ⇨242(6), 244(30)

Mother's ownership of automobile raised presumption that son drove automobile with her consent and for her purposes and court

could, even in face of contradictory testimony, if court doubted credibility thereof, base its finding upon presumption alone (Code Civ. Proc. § 2061, subd. 2).

2. Appeal and error ⇨1011(1)

Trial court's finding that automobile driven by son was driven with mother's consent, which finding was based upon conflicting evidence and upon presumption that son drove automobile with mother's consent, *held* conclusive (Code Civ. Proc. § 2061, subd. 2).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Calvin Phillips against Virginia Cuccio. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ezra Neff, of Los Angeles, for appellant.

Morfoot & Sutton and J. Widoff, all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appeal by defendant Virginia Cuccio from judgment awarding plaintiff damages for personal injuries.

An automobile driven by Peter John Cuccio, but owned by his mother, appellant herein, struck and injured respondent. The court, sitting without a jury, rendered judgment for respondent for the resultant damages. Appellant presents the sole question as to whether there was any evidence to support the finding of the court that at the time in question the automobile was being operated with the consent of appellant. The question is further simplified by the fact that there was no proof of any express consent, leaving the question here whether there was implied consent.

It appears in evidence that Peter Cuccio had driven the car in question four times or more over a period of three years, one or more of these occasions being subsequent to the accident. As to some of those the evidence might be interpreted that the driving was with the consent of the mother; as to the remainder the record is silent. The mother testified that her son did not drive the car very much and that she bought it, with her separate funds, for the family.

[1, 2] Respondent rests his side of the question upon the claim that the ownership of the automobile by the mother raised a presumption that the son drove the machine with her consent and for her purposes, and that even in the face of contradictory testimony

the court could, if it doubted the credibility of the testimony, base its finding upon the presumption alone. This view is sustained by *Randolph v. Hunt*, 41 Cal. App. 739, 746, 183 P. 358; *Hathaway v. Mathews*, 85 Cal. App. 31, 39, 258 P. 712; *Perry v. A. Paladini, Inc.*, 89 Cal. App. 275, 282, 264 P. 580; *Ransford v. Ainsworth*, 196 Cal. 279, 237 P. 747; *Rapolla v. Goulart*, 105 Cal. App. 417, 422, 287 P. 562; *Bushnell v. Tashiro*, 115 Cal. App. 563, 565, 2 P.(2d) 550, and *Strasburger v. Prescott*, 111 Cal. App. 104, 295 P. 357. To hold otherwise would be to say that a presumption ceases to exist whenever testimony in contradiction is received. Neither a court nor a jury is bound to decide in conformity with the testimony of witnesses and against a presumption. Code Civ. Proc. § 2061, subd. 2. In the case at bar the judge who heard the evidence passed upon the weight and credibility of the testimony, judging this not merely by the words uttered but by the various factors, elements, and circumstances which govern decisions of matters of fact. This decision, being based upon evidence, the presumption and evidence of circumstances, the question involved on this appeal is not one of law but one of fact, and the decision of the trial court is conclusive.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 248

**CALISTOGA NAT. BANK v. FIDELITY &
DEPOSIT CO. OF MARYLAND.**

Civ. 5205.

District Court of Appeal, Third District,
California.

March 14, 1935.

Rehearing Denied April 13, 1935.

Hearing Denied by Supreme Court
May 13, 1935.

Insurance 430

Surety on fidelity bond insuring bank against loss by reason of cashier's fraud, dishonesty, or abstraction of funds held not liable by reason of cashier's transactions in securing loan from bank to make up his contribution as director to cover depreciation in securities of bank and allegedly misrepresenting realty given as security, where directors' contribution amounted to gift and transactions simply effected transfer of funds of bank from one account to another; all mon-

ey represented thereby remaining in possession of bank (12 USCA § 55).

Appeal from Superior Court, Napa County;
Percy S. King, Judge.

Action by the Calistoga National Bank against the Fidelity & Deposit Company of Maryland. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

Thomas E. Davis, of San Francisco, for appellant.

Clarence N. Riggins, of Napa, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal by the defendant from a judgment against it for the sum of \$5,550 and interest and costs upon a Fidelity bond theretofore executed and delivered by the defendant to the plaintiff, insuring the plaintiff against loss by reason of the fraud, dishonesty or abstraction of funds of the bank by its officers (in this case, the cashier of the bank).

The bond involved in this action, so far as pertinent here, is in the following words: "The Fidelity and Deposit Company of Maryland as insurer * * * hereby binds itself to pay to the Calistoga National Bank, as employer, such pecuniary loss as the employer shall sustain, of money or other personal property, * * * through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction, misapplication or misappropriation, or any other dishonest or criminal act, or omission of, or by any of the employees listed in the schedule forming a part of this bond."

The complaint alleges that on or about the 5th day of May, 1931, while one Roscoe W. Westover was acting as the duly appointed cashier of the plaintiff, said Westover fraudulently, dishonestly, and wrongfully abstracted \$5,550 from the funds of the plaintiff's bank and appropriated the same to his own use. The means employed are detailed at considerable length in the complaint and set forth in the findings, which is alleged to have consisted in wrongful representations as to certain real property tendered as security for a loan in the sum just mentioned.

Upon this appeal it is urged that the findings lack evidentiary support in that there is no showing that the plaintiff suffered any

pecuniary loss within the meaning of the bond executed by the defendant. It is also insisted that the plaintiff has suffered no pecuniary loss by reason of any of the acts of the said Roscoe W. Westover while acting as its cashier.

The Calistoga National Bank was capitalized for the sum of \$75,000. In the year 1931 its five directors consisted of C. A. Carroll, J. C. Siemsen, Calvin Foote, R. W. Westover, and Andrew Rocca. Rocca was the president of the bank and Westover its vice president and cashier. Early in the year 1931 a bank examiner notified the bank that there was a depreciation of \$19,000 in the bond account or reserve or capital structure of the bank, and that it be eradicated. This depreciation consisted in the market value of securities held by the bank in which its funds had been invested. Instead of calling upon the stockholders to take proceedings under section 55 of title 12, USCA p. 98, the five directors appear to have agreed to voluntarily contribute proportionate amounts in order to cover the depreciation in its securities. Westover's proportion, based upon the number of shares of the capital stock held by him, amounted to the sum of \$5,550. Westover did not have the money available. The other directors of the bank agreed that the bank should loan him the sum of money necessary to enable him to make his contribution, Westover giving as security certain real property. The loan was nominally made to a man named S. C. Biddle, a brother-in-law of Westover, and on May 1, 1931, a cashier's check of the bank for the sum of \$5,550, evidencing the amount of the loan, was issued to Biddle. Biddle indorsed this check to Westover, and Westover returned the cashier's check to the bank and it was credited upon the books of the bank as his voluntary contribution to the bond account. At the time of Westover making his contribution, the other directors likewise contributed a proportionate sum, based upon their ownership of stock in the bank, making up the alleged deficiency of \$19,000.

The claim on the part of the plaintiff is that Westover fraudulently misrepresented the extent and character of the real property given as security, and that as a result Westover abstracted \$5,550 from the bank, and thereby caused the bank to suffer a pecuniary loss in such sum. Upon discovery of the alleged fraud, the bank demanded payment of the defendant, and upon refusal, this action was instituted.

At the time these transactions were being had, the plaintiff was aware that the real es-

tate, proposed to be given by Roscoe W. Westover as security for the loan to be made to him, stood in the name of D. L. Westover, his father. The ranch owned by D. L. Westover consisted of approximately 500 acres situate in Placer county, 433 acres thereof lying on one side of a certain highway, and 80 acres thereof lying upon the opposite side of the same highway. The 80 acres contained all the improvements. There is nothing in the record to which our attention has been called which indicates the exact value of either tract of land.

On the part of the appellant it is contended that Roscoe W. Westover represented that the security to be executed by his father would cover all of the property referred to, whereas in truth and in fact it only covered the 433-acre tract of land. The only finding of the court from which any inference can be drawn as to the value of the land is in these words: "That the said Roscoe W. Westover did not have any examination of the title to said property made until 1932, and never obtained title insurance, or other evidence of a merchantable title thereto."

On the 27th day of April, 1931, a deed to the 433-acre tract was executed by D. L. Westover and Ida F. Westover, his wife, and delivered to Roscoe W. Westover. On June 9, 1931, Roscoe W. Westover and Kathryn Westover, his wife, executed and delivered to Calistoga National Bank a deed of conveyance to the same property. On or about May 1, 1931, Roscoe W. Westover, as vice president and cashier of the bank, delivered to S. E. Biddle a cashier's check for \$5,550 hereinbefore referred to, and received from S. E. Biddle a promissory note, payable to the bank on demand, in the same sum. Thereafter, and on or about the 30th day of November, 1931, the Calistoga National Bank deeded said property to S. E. Biddle. This deed was signed by Roscoe W. Westover as vice president and cashier, and by Andrew Rocca as president. Thereupon, S. E. Biddle executed and delivered to the bank a trust deed of the property as security for the payment to the bank of said sum.

The record shows that from the inception of the transactions set forth herein, the bank knew that the transaction was being had for the purpose of enabling Roscoe W. Westover to make a voluntary contribution to the bank in order that its capital structure, to wit, the securities in which its funds had been invested, might be restored and stand unimpaired. The bank also knew of the transaction with Biddle, and that the name of Biddle was used

only as a means of enabling Westover to make such contribution. The knowledge of the president of the bank as to the character of the transaction and what was done is shown by the following testimony:

"Q. It was understood at all times by yourself and the other directors of the bank that Mr. Biddle personally was merely lending his name in the transaction? A. It was.

"Q. You knew that this ranch, this D. L. Westover ranch, was not owned by Roscoe W. Westover at that time, did you not? A. I did.

"Q. And you knew that it did belong to Mr. D. L. Westover, his father? A. I knew that it had belonged to Mr. D. L. Westover, his father, and I presumed that it still did.

"Q. In any event, you knew that Roscoe did not own it? A. That is very true.

"Q. And that before he could give your bank any security in the form of a deed or a deed of trust or a mortgage covering the ranch, he would have to get it from his father, did you not? A. That was quite evident.

"Q. Now, did you see this deed when it came back to the bank? * * * A. I did.

"Q. Now, what was the next thing done with reference to the matter, as far as you know? A. After the loan was accepted by the Board?

"Q. Yes, sir. A. Mr. Westover was authorized to conclude the loan in the usual manner.

"Q. What do you mean by that? What was said? A. He was told to complete the loan in the usual manner, that is, the giving of that property as security for the loan.

"Q. And thereafter do you know if Mr. Westover took a note from S. E. Biddle? A. He did.

"Q. And these deeds, plaintiff's exhibits 4 and 5 were obtained by the bank? A. Yes, they were.

"Q. And when that note was executed, this cashier's check, that is dated May 1st, 1931, payable to the order of S. E. Biddle, was executed, is that correct? A. That is correct. Both of them were executed by R. W. Westover.

"Q. Just a minute— A. (interrupting, continuing) or put through. The note was put through and the cashier's check was drawn by Mr. Westover.

"Q. Was the note executed by Mr. Westover? A. It was put through our books, I shouldn't have used the word 'executed.' Mr. Biddle is the signer of it.

"Q. But the cashier's check to S. E. Biddle was delivered or was issued anyway, in exchange for this note, is that correct? A. That is.

"Q. Then the cashier's check was endorsed by S. E. Biddle and then endorsed to R. W. Westover and then what was done with it? A. That is not just the way it was handled.

"Q. Well, it bears those endorsements? A. Yes, it does. Mr. Westover took the cashier's check and mailed it to S. E. Biddle, who was then in Oakland in a hospital and who furnished his endorsement and returned it to R. W. Westover and then R. W. Westover put his endorsement on it and then put it into his account.

"Q. Well, what was done with it then? A. The proceeds of it were used for this voluntary contribution to the bond account adjustment.

"Q. And does this sheet (daily ledger sheet for May 5, 1931), show what was done with the proceeds of the \$5550.00? A. It shows it was used to make Westover's payment of \$5550.00.

"Q. To what account? A. To the bond adjustment account.

"Q. Does the sheet show whether upon the same date any other payment was made by anybody else in the same account? A. It does.

"Q. What other payment is shown? A. J. C. Siemsen, \$1500.00, C. A. Carroll, \$1800.00, C. E. Foote, \$600.00, A. Rocca, \$6750.00, Henry Brown, \$3000.00.

"Q. How much does that total together with Mr. Westover's payment of \$5550.00? A. \$19,200.00.

"Q. As I understand it, all of these payments were made upon the same day to make up this total? A. That is correct.

"Q. It was understood at all times by yourself and the directors of the bank that Mr. Biddle personally was merely lending his name in this transaction? A. It was.

"Q. Yes, that he was not personally going to pay this \$5550.00? A. I understood it that way.

"Q. And these deeds, plaintiff's exhibits 4 and 5, were obtained by the bank? A. Yes, they were.

"Q. Do you know who attended to the preparation of these various deeds and deed of trust, that are received in evidence in this case? A. Mr. Westover did, as far as I know. He met his father and obtained the deed from his father, having it prepared elsewhere.

"Q. But for the bank and it was Mr. Westover that did that? A. Yes, it was. *They were filed by Mr. Westover in the regular bank's file with an appraisal on the outside by himself.*"

This testimony shows conclusively that the president of the bank had knowledge of the execution of all the instruments executed in carrying out the transaction. The only testimony as to any encumbrances on the property given as security for the payment of the loan relates to delinquent taxes in the sum of approximately \$700. D. L. Westover testified that the 433 acres in 1931 was assessed for approximately the sum of \$10,000; that the land at one time was worth \$60 per acre; and that at the present time he fixed its market value at \$30 per acre.

As we have stated, the court made no finding as to the value of the property, and outside of what we have referred to, we have found no testimony relating to that subject. While the details of the transaction were left to Roscoe W. Westover, the testimony of the president of the bank shows that the character of the instruments, the form thereof, and the purpose were all well known, and that if any liability was incurred by any one to the bank, it was a liability on the part of Roscoe W. Westover, and that so far as S. E. Biddle was concerned, his name was simply used as a convenient instrument with the knowledge of the president of the bank, and without any consideration passing from Biddle to the bank.

Passing the question as to the value of the property and the mere allegation that the title thereto was not insured nor shown to be merchantable, the crucial question is as to whether the bank suffered any pecuniary loss by reason of the transactions which we have detailed within the meaning of the bond executed and delivered to it by the defendant. Irrespective of whether the moneys contributed by the directors to make up the deficiency in the bond account be called voluntary contribution, donation, or gift, the fact remains that the moneys contributed by all of the directors amounted to nothing more than a gift. Neither Westover nor any of the other directors could have been compelled to make up the deficiency in the capital structure of the bank caused by the depreciation in the market value of the securities held by it. A similar question was before this court in the case of *Dudley v. Citizens' State Bank*, 103 Cal. App. 433, 284 P. 958, 962, where it is said: "Where the directors of a bank, in response to a demand of the state bank examiner, that they make good an impairment of the capital

stock, sign and discount their personal note and deposit the proceeds to the credit of the bank, the transaction is a donation or gift to the bank." Citing *Interstate Trust, etc., Co. v. Irwin*, 138 La. 325, 70 So. 313; *Wright v. Gurley*, 133 La. 745, 63 So. 310." In that case the question was whether moneys advanced by a president of the bank constituted either a loan or a gift.

That there was a direct or indirect obligation on the part of the bank to make good the deficiency is shown by section 55, 12 USCA page 98. That section reads: "Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each." This was the obligation placed upon the plaintiff in this case. In the event that the shareholders failed to make good the deficiency by levying an assessment, the section further provides that if any association shall fail to pay up its capital stock or go into liquidation, the controller of the currency shall appoint a receiver to take charge of the affairs of the bank. We do not need to cite the various sections of the law authorizing assessments to be levied upon stockholders to pay the indebtedness in the event that the assets of the bank are insufficient.

The finding of the court to the effect "that on or about the 5th day of March, 1931, the said Roscoe W. Westover fraudulently, dishonestly and wrongfully abstracted \$5550.00 from the funds of the plaintiff's bank and appropriated the same to his own use by the following means and devices," is shown by the foregoing not to be supported. No funds of the bank were appropriated to the uses and purposes of Roscoe W. Westover. All the funds remained in the bank. The transaction simply affected a transfer of the funds of the bank from one account to another. As a legal proposition the funds were not appropriated to the uses and purposes of Roscoe W. Westover. Whatever was done, and whatever transfer of funds was made, were for the uses and purposes of the bank alone. The money represented by the transaction remained in the possession of the bank at all times. Its funds were not abstracted. Nothing was taken from the possession of the bank. The finding of the court is that the money was abstracted. There is no finding that the bank

suffered any pecuniary loss, for the simple reason that the testimony shows the bank suffered no pecuniary loss. The obligation of the bond executed by the defendant, as we have set forth herein, distinctly binds the Insurance Company to make good only such pecuniary loss as the bank might suffer. However irregular the transaction had with Westover may have been, unless the bank suffered a pecuniary loss, and had some of its funds or property taken away from its possession, no cause of action arose, or could arise against the defendant. The bond binds the defendant to make good pecuniary losses. It does not covenant that all the transactions had by the various officers of the bank with the bank shall be regular or strictly in accordance with law. The bank was in exactly the same position, so far as the value of its funds were concerned, after, as before the transactions had with Roscoe W. Westover. If it ever realizes by reason of the trust deed covering the 433 acres, the bank will be just that much ahead. In other words, it will have gained instead of suffered a loss. That the security may not be equal in value as understood by other directors of the bank, affects only the question of how much the bank may gain by reason of its possession of the trust deed. A somewhat similar question was before the supreme court of Iowa in the case of *Birrell v. Fidelity & Casualty Co. of New York*, 193 Iowa, 860, 188 N. W. 26, 30. In considering the question of what constitutes wrongful abstraction and loss the court said: "It is not to be overlooked that the creditors of the corporation had a right to payment from the assets of the corporation. The appellant could not, by a system of bookkeeping, separate its old accounts from its new accounts, and divide its so-called 'old assets' from its 'new assets' in any manner to change the status of outstanding creditors of the corporation. Nor could it 'lose' by the payment of its valid obligations, whether the same were due to 'old' creditors or to 'new' creditors. At the threshold of the case, we think appellant has failed to establish that it has suffered a 'loss' within the meaning of the contract of indemnity, by the appropriation of its assets to the payments of its bona fide debts. Was there a 'wrongful abstraction' of appellant's assets? As before stated, we are not called upon to determine in this case any question of the individual liability of *Birrell* to appellant for failure on his part to perform the terms and conditions of his contract, unless such failure caused a loss to appellant by reason of the 'wrongful abstraction' of appellant's assets.

The contract or bond of the fidelity company did not cover every liability or claim that may exist between the appellant and *Birrell*. *Sinclair v. National Surety Co.*, 132 Iowa, 549, 107 N. W. 184; *Monongahela Coal Co. v. Fidelity & Deposit Co.*, 94 F. 732, 36 C. C. A. 444; *Milwaukee Theater Co. v. Fidelity & Casualty Co.*, 92 Wis. 412, 66 N. W. 360; *Kansas Flour Mills Co. v. American Surety Co.*, 98 Kan. 618, 158 P. 1118. * * * It only insured the appellant against 'loss' by the 'wrongful abstractions' of *Birrell*. Did the use of appellant's assets to pay appellant's debts constitute a 'wrongful abstraction'? We think not within the meaning of the contract of insurance. *Birrell's* obligations to the appellant have in no manner been changed. If he agreed to pay certain debts of the appellant, and has not paid them, he is still liable therefor to the appellant. But the fidelity company did not assume any liability whatever for the payment of these debts by *Birrell*. It did not undertake to indemnify appellant against the payment of its debts, with its own funds. It cannot well be said that the payment of appellant's obligations, with its own assets, constituted a 'wrongful abstraction' of said assets within the meaning of the contract of the fidelity company."

The obligation, either direct or indirect, as we have stated, of the plaintiff, was to make good the deficiency in its bond account, and the transfer of its funds from its commercial account to the bond account did not constitute an abstraction of its funds or occasion any loss.

Irrespective of the entries upon the books of the plaintiff, the facts of the case must be looked to to determine the liability, if any, of the defendant. *Turlock Irrigation Dist. v. Edwards*, 205 Cal. 320, 270 P. 936; *Anaheim Union Water Co. v. Parker*, 101 Cal. 483, 35 P. 1048. Thus, while the books show the issuance of a cashier's check to *S. E. Biddle*, the facts disclose that it was only a means of transferring the funds of the bank from what we have called the commercial account, or ordinary assets, to the bond account. There was no depletion of its funds at any time, as shown by the facts.

That a surety is not liable unless there has been an actual loss, is the holding in the following cases: *First National Bank v. National Surety Co.* (C. C. A.) 130 F. 401, 66 L. R. A. 777; *Hudson v. U. S.* (C. C. A.) 55 F.(2d) 591. In all the cases which have been called to our attention, and which we have been able to find, where the surety has been held liable, the facts show an actual loss of funds. Noth-

ing would be added of value by an analysis or review of such cases.

Neither the testimony nor the findings showing any loss of the funds of the plaintiff within the meaning of the surety bond executed and delivered to the plaintiff by the defendant, it follows that the judgment should be reversed, with directions to the trial court to enter judgment in favor of the appellant, and it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.



5 Cal.App.2d 229

HAIDOPOULOS et ux. v. WOOLLETT et ux.
Civ. 5267.

District Court of Appeal, Third District,
California.

March 13, 1935.

1. Specific performance ☞119

Proof of value of property, for which plaintiff in suit for specific performance of exchange agreement contracted to exchange other property, was indispensable to his cause of action (Civ. Code, § 3391).

2. Specific performance ☞51

Equity court will refuse to enforce specifically a contract not perfectly fair, equal, and just in its terms and circumstances (Civ. Code, § 3391).

3. Specific performance ☞121(9)

Party seeking specific performance of contract, not admitted in answer to be fair and supported by adequate consideration, must affirmatively show that such remedy is not barred by statute prohibiting enforcement of specific performance of contract against party not receiving adequate consideration therefor or contract not just and reasonable as to defendant, though latter relies on fraud as one of several affirmative defenses (Civ. Code, § 3391).

4. Specific performance ☞117

Answer properly traversing allegations of complaint in suit for specific performance of contract as to fairness and adequacy of consideration therefor raises fact issue and puts plaintiff on his proof (Civ. Code, § 3391).

5. Specific performance ☞117

Plaintiffs in suit for specific performance of contract for exchange of real properties

held not relieved from proving value of defendants' property on ground that latter's pleadings did not disclose that question of value would be issue; plaintiff being required by statute to prove as part of his case in chief that contract was just and reasonable as to defendant and consideration adequate (Civ. Code, § 3391).

6. Appeal and error ☞1011(1)

Conflict in evidence presents no ground for reversal of trial court's finding, sustained by competent evidence.

7. Specific performance ☞121(9)

Evidence in suit for specific performance of contract to exchange real properties held sufficient to sustain trial court's finding that contract was not just, fair, and equitable between parties, nor just and reasonable as to defendants, and that they were not to receive adequate consideration (Civ. Code, § 3391).

8. Estoppel ☞68(2)

Defendants prevailing in action, resulting from their repudiation of contract, for specific performance thereof, held not estopped to demand reasonable attorney's fee, provided for by contract in event of breach, though they relied on rescission as one defense.

9. Contracts ☞315

Contract may be breached by nonfulfillment.

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Suit by Pete Haidopoulos and wife against A. E. Woollett and wife. Judgment for defendants, and plaintiffs appeal.

Affirmed.

H. G. Bittleston and L. W. Jaycox, both of Los Angeles, for appellants.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondents.

WOODWARD, Justice pro tem., delivered the opinion of the court.

Specific performance of an agreement for the exchange of real property was denied plaintiffs, and they appeal from the judgment, which was in favor of the defendants on all the issues joined.

Omitting unnecessary minutiae, the facts of the controversy may be epitomized as follows: On March 19, 1932, the parties executed a written contract, under the terms of which plaintiffs' 10-acre citrus grove, situated near Yuma, Ariz., was to be exchanged for defendants' ten-unit bungalow, situated in

Los Angeles county, together with \$1,500 in cash. The Arizona property was to be conveyed free of incumbrance, with the exception of a lien for taxes, while the bungalow court and furnishings were to be accepted subject to a secured indebtedness of \$10,500. Immediately upon the execution of the agreement, it seems that each of the parties gave the other possession, and they then proceeded to open a 30-day escrow with the Citizens' National Trust & Savings Bank of Los Angeles. On April 12, 1932, by mutual consent, the escrow instructions originally filed were amended; a defect in plaintiffs' title having been discovered and an adjustment of the matter determined upon. This amendment provided that plaintiffs should have an extension of six months in which to clear the title from a cloud cast thereon by the recordation of a previously executed agreement of exchange between "Pete" Haidopoulos and Orin A. Pearce. Shortly thereafter another amendment was made, the effect of which was that defendants, in lieu of the cash payment of \$1,500, would execute a promissory note to plaintiffs in the sum of \$481.10 and accept a conveyance to the citrus grove subject to a mortgaged indebtedness of \$1,500. The original agreement having been thus modified, it seems that the parties were at last ready to consummate the transaction, each having deposited all necessary papers with the bank; but thereafter, on April 29, 1932, the Security Title Company of Yuma, Ariz., advised the escrowee of eight additional defects in plaintiffs' title, chief of which was a reservation by a previous grantor, whereby plaintiffs' purported 10 acres were diminished by .38 acre. Defendants, after being informed of this development, waited until May 23, 1932, at which time they served plaintiffs with a notice of rescission, setting forth the various defects of title as grounds therefor. Plaintiffs thereupon commenced the present action for specific performance. The answer sets forth a number of defenses, including failure of plaintiffs to comply with the terms of the agreement within the time specified, or within a reasonable time thereafter; and fraud on the part of plaintiffs and their agent in obtaining defendants' consent to said agreement and escrow instructions.

The court made the following finding: "That it is not true that said contract of exchange, or the terms or conditions thereof were, or are, in all respects just, fair and equitable between the parties, and in that connection the court finds that said contract

is not just and reasonable as to the defendants herein, and that they were not to receive an adequate consideration by said exchange agreement. The court further finds that the defendants' property, as set forth and described in said exchange agreement, being the real property at Santa Monica, together with the furniture and furnishings therein was, on March 19, 1932, of the value of \$16,859.57; that said property was subject to a first mortgage of \$10,500.00, and that defendants had a net equity in said property of the value of \$6,359.57. That the plaintiffs' property at Yuma, Arizona, on said 19th day of March, 1932, was of the value of \$2,000.00, and that according to said exchange agreement the defendants were trading their property at Santa Monica, with an equity of \$6,359.57 and \$1,500.00 cash, for the plaintiffs' property with only a value of \$2,000.00, and that thereby the consideration as to the defendants was not adequate, and said contract was not just and reasonable." The other findings adopted by the court sustained each of the several defenses.

[1] The contract was silent as to the value of either the citrus grove or the bungalow court. With reference to the value of the former property, plaintiffs called Hugh Palmer, a resident of Yuma, who testified that he was familiar with the citrus grove, having taken care of it during the few months that defendants had it; that the grove, consisting of approximately $7\frac{1}{2}$ acres of oranges and $2\frac{1}{2}$ acres of grapefruit, was "in good condition," and had a reasonable value, at the time the contract was executed, of \$1,500 an acre. Plaintiffs introduced no evidence whatever as to the value of the Woollett property at Santa Monica. Such proof, it seems to us, was indispensable to plaintiffs' cause of action, and its absence would have justified a motion for a nonsuit. Section 3391 of the Civil Code provides that specific performance cannot be enforced against a party to a contract "if he has not received an adequate consideration" for the same, or, "if it is not, as to him, just and reasonable."

[2] As pointed out in the case of *Porter v. Anderson*, 14 Cal. App. 716, 721, 113 P. 345, 347: "The Code rule, as it is thus given, is only a legislative reaffirmation of the rule as to the remedy of specific performance as it has always been recognized and practised in courts of equity. Unless the contract is perfectly fair, equal, and just in its terms and in its circumstances, a court of equity will incontinently refuse to specifically enforce it. * * *

And a natural concomitant of this

unassailable and well-understood proposition is the rule that a party seeking to invoke this equitable remedy must plead as well as prove that the obligation is just and reasonable as to the party against whom he asks its specific enforcement." See, also, *Windsor v. Miner*, 124 Cal. 492, 57 P. 386; *Martin v. Condrey*, 13 Cal. App. 618, 110 P. 457; *Rittigstein v. Dignan*, 122 Cal. App. 357, 9 P.(2d) 856; *Bonney v. Petty*, 125 Cal. App. 527, 13 P.(2d) 969.

[3, 4] In the absence of an admission in the answer that the contract is fair and supported by an adequate consideration, it is manifestly incumbent on a party seeking specific performance to affirmatively show that his right to the remedy is not barred by the Code section quoted. And he is not relieved of this duty merely because the defendant relies on fraud as one of several affirmative defenses. *Windsor v. Miner*, supra. If the allegations of the complaint as to fairness and adequacy of consideration are properly traversed by the answer, an issue of fact has been joined and plaintiff is put upon his proof. In the instant case the proof undoubtedly stopped short of the goal. How could the court have determined the equity of the transaction without evidence as to the value of the Santa Monica property? But the defendants, instead of relying on the patent deficiencies of plaintiffs' case, as they could have done, proceeded to offer evidence on the question of value and also in support of their several affirmative defenses. W. H. Fitchmiller, a real estate broker of Santa Monica, testified that he was familiar with realty values in Santa Monica; that he knew the Woollett apartments, and had appraised the same; that the property, including the furnishings, had a market value, as of March 19, 1932, of \$16,859.57. Voyle L. Smith, called as a witness for the defendants, testified that he resided at Yuma, Ariz., and had been actively engaged in the real estate business there since 1913; that he had known the Haidopoulos property for some eighteen years, and that its reasonable market value during the month of March, 1932, and at all times thereafter, was \$2,000.

[5-7] On the vital question of comparative value and the court's finding thereon, appellants, after calling attention to the fact that the parties were dealing with each other at arm's length and that Woollett had expressed a desire to go to Arizona for his health, have this to say: "The appellants had no testimony in rebuttal of that given by W. H. Fitchmiller, as to the value of the Santa Monica property, as the pleadings of respondent did not dis-

close that the question of value would be an issue, unless it might be said that the denial of paragraph X of the amended complaint would be sufficient in itself to create such an issue." Appellants entirely overlook the Code requirement that the plaintiff in an action for specific performance must prove that the contract he seeks to enforce is just and reasonable as to the defendant and that the consideration is adequate. He must, as we have already pointed out, make this proof as part of his case in chief. Under the pleadings in the instant case, it devolved upon plaintiffs to show the value of both pieces of property. This they failed to do, and the proof offered by the defendants on the subject merely created a conflict in the evidence as to the value of the Arizona property. Even though both sides had offered exhaustive but conflicting testimony on the question of value, the result on appeal would be the same. It is rudimentary, of course, that, where there is competent evidence to sustain a particular finding, the fact that such evidence was in conflict presents no ground for reversal. *Cross v. Bouck*, 175 Cal. 253, 165 P. 702; *Lanning v. Talmage*, 66 Cal. App. 48, 51, 225 P. 25. We must hold that there is competent evidence to sustain the finding which we have set out in full.

With one exception, it does not appear necessary to notice with particularity the various specifications of error presented in appellants' brief, since they are in nowise related to the foregoing discussion. Even if we should determine, as urged by appellants' counsel, that the defects in title were too trivial in character to support a finding that plaintiffs failed to perform their contract within the time specified, or within a reasonable time thereafter, recouping being the usual method of compensating the other party in such circumstances, or that defendants, subsequent to the notice of rescission wrote letters to their caretaker which could be construed as a waiver of the rescission, or, that the court erred in overruling an objection to certain testimony offered by the defendants in support of their allegations of fraud—if all of these various contentions were sustained, appellants' position, so far as this appeal is concerned, would not be improved in the slightest degree. There would still remain the finding, supported by competent evidence, that the contract sought to be enforced was unfair and unjust to the defendants.

[8, 9] The court allowed defendants, on their counterclaim, the sum of \$536.19 to cover rentals collected by Haidopoulos while he

was in possession of the bungalow court, and to reimburse them for delinquent water charges which they had paid on the Arizona property, together with other out-of-pocket expenses. Appellants make no specific objection to this item, but they do challenge the court's right to award defendants an attorney's fee of \$400. The contract provided "that in the event of any breach or a disagreement as to the purport and intent of the several conditions and provisions contained in this agreement, necessitating an adjudication by the courts, the prevailing party shall have a reasonable attorney's fee, which the losing party agrees to pay." Appellants urge that respondents, having repudiated the contract, are in no position to avail themselves of the provision for attorney's fees. We do not think this contention can be sustained. A contract may be breached by nonfulfillment (9 Cor. Jur. 319), and plaintiffs' action for specific performance presupposed such a breach. Defendants prevailed in the resultant action, and we do not think they were estopped from demanding a reasonable attorney's fee merely because they relied on rescission as one of their defenses.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



5 Cal.App.2d 401

RCA PHOTOPHONE, Inc., v. HUFFMAN.
Civ. 1329.

District Court of Appeal, Fourth District,
California.

March 20, 1935.

Hearing Denied by Supreme Court
May 17, 1935.

1. Statutes ⇨245

Taxing statute must be strictly construed in favor of the citizen as against the taxing power, and tax proceedings must be in strict accord with statute.

2. Taxation ⇨80

Assessment on moving picture sound equipment installed in theater held properly made against person to whom equipment was leased and in whose possession it was, as against contention that it was assessable only to owner of equipment (Pol. Code, § 362S).

3. Statutes ⇨245

Statutory language may not be given unnatural construction to defeat tax legislation nor may plain intent of Legislature be disregarded.

4. Statutes ⇨174, 175

When statutory language will reasonably permit, courts will so construe statutes that they may become operative rather than be defeated (Civ. Code, § 3541).

5. Statutes ⇨231

The Codes must be construed together and harmonized wherever possible (Pol. Code, § 4480).

6. Taxation ⇨576

Under statute authorizing assessor to collect taxes on personalty by seizure and sale of any personal property "owned" by person against whom tax is assessed, assessor held authorized to seize and sell personal property on which assessment was lawfully made against person in lawful possession thereof, though not the owner (Pol. Code, § 3821).

[Ed. Note.—For other definitions of "Own," see Words & Phrases.]

7. Taxation ⇨582

Where personal property tax on moving picture sound equipment was assessed against lessee of equipment who was in lawful possession thereof, though not the owner, such equipment could be sold to satisfy the tax (Pol. Code, §§ 3628, 3716, 3820, 3821).

8. Taxation ⇨80

That assessor, who assessed tax on moving picture equipment to the lessee in lawful possession thereof, could have learned identity of true owner by inspecting markings on equipment, held immaterial, since unsecured personal property may be assessed to either legal owner or lawful possessor (Pol. Code, § 3628).

9. Taxation ⇨353, 582

Where lessee in possession of leased moving picture equipment failed to list property for assessment, and it was not assessed in fiscal year 1931-32, assessor held authorized to make double assessment for fiscal year 1932-33, and property could be sold for such taxes (Pol. Code, § 3649).

10. Taxation ⇨582

That leased moving picture equipment on which personal property tax of \$80.69 had been levied was sold by tax collector for \$83.69 held not to warrant court, in former owner's action against buyer at tax sale, to set aside the sale for gross inadequacy of price and restore owner to possession, since first concern in tax sales is that taxing body recover at least the tax, penalties, and costs,

and not that owner receive reasonable value of his property (Pol. Code, § 3821).

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by RCA Photophone, Incorporated, against M. D. Huffman, in which defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Affirmed.

Ray W. Hays, of Fresno, for appellant.

David E. Peckinpah, of Fresno, for respondent.

MARKS, Justice.

Plaintiff brought this action to recover possession of certain RCA photophone sound equipment of the value of \$1,500 which had been leased to T. Miwa and which defendant claimed under a sale for delinquent taxes made by the assessor of Fresno county. Judgment was rendered against plaintiff on its complaint and in favor of defendant on his cross-complaint. The appeal is taken from that judgment.

On October 15, 1930, plaintiff leased the sound equipment to T. Miwa for a term of years. It was installed in the Lyceum Theatre in the city of Fresno. Under the contract Miwa was given only a possessory right in the property. He agreed to pay all taxes and assessments levied upon it and to furnish plaintiff with evidence that he had done so. He failed to list the property for assessment and it was not assessed in the fiscal year 1931-32. The assessor of Fresno county discovered this omission in 1932 and made a double assessment for the fiscal year 1932-33. It was assessed to Lyceum Theatre—T. Miwa and the tax computed at \$80.69, which was not paid. The tax collector seized the property, gave the required notice of sale, and sold it to defendant for \$83.69. Plaintiff tendered defendant the amount which he had expended and demanded possession. The demand was refused and this action followed.

It is contended by plaintiff that the assessment, seizure, and sale by the tax collector were void and conveyed no title to defendant for the reasons that (1) the property had not been assessed to its owner, and (2) if it be conceded that personal property may be assessed to one in whose lawful possession it is found, it cannot be seized and sold by the assessor unless it is assessed to its owner. The questions seem to be of first impression in California.

[1] Plaintiff first points out that as tax proceedings are in invitum they must be in strict accord with the statutes governing them; that taxing statutes must be strictly construed in favor of the citizen and against the taxing power. Both propositions are supported by unquestioned authority. *Lake County v. S. B. Q. M. Co.*, 66 Cal. 17, 4 P. 876; *City of San Luis Obispo v. Pettit*, 87 Cal. 499, 25 P. 694; *Pioneer Express Co. v. Riley*, 208 Cal. 677, 284 P. 663; *Merchants' Trust Co. v. Hopkins*, 103 Cal. App. 473, 284 P. 1072.

Section 3628 of the Political Code provides in part as follows: "The assessor must, between the first Mondays in March and July of each year, ascertain the names of all taxable inhabitants, and all the property in his county subject to taxation, except such as is required to be assessed by the state board of equalization and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at twelve o'clock meridian of the first Monday in March next preceding; but no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid, nor shall anything herein release any person, firm, corporation or association from their duty to file the statement required by law."

Sections 3820, 3821, 3791, 3792, and 3794 of the Political Code provide for the collection of taxes on personal property by summary seizure and sale where the tax is not secured by a sufficient lien upon real property. Section 3821 contains the following: "In the case provided for in the preceding section, at the time of making the assessment, or at any time before the first Monday of August following the assessment, the assessor may collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed. * * *

[2] We are of the opinion that the plain provisions of section 3628 of the Political Code gave the assessor the right to assess personal property to the person in whose lawful possession it was found at 12 o'clock noon on the first Monday in March of each year and that as the property in question here was in the possession of T. Miwa in his Lyceum Theatre the assessment to him was properly and legally made. There is nothing in the case of *Weyse v. Crawford*, 85 Cal. 196, 24 P. 735, conflicting with this conclusion. There is dicta on page 202 of 85 Cal., 24 P. 737, supporting it. See, also, dicta in *Title Guaranty & Trust Co. v. County of Los Angeles*, 3 Cal.

App. 619, 86 P. 844; and Merchants' Trust Co. v. Hopkins, supra.

The results which will follow a proper assessment are set forth in section 3716 of the Political Code as follows: "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent."
* * *

Up to this point our course is clearly plotted by the provisions of the Political Code. The taxes computed on the assessment had the effect of a judgment against Miwa and created a lien upon the personal property equal in effect to the levy of an execution. The difficulty in the case does not arise until the time for the seizure and sale of the property under the provisions of section 3821 of the Political Code which gives the assessor power to satisfy the tax by the "seizure and sale of any personal property owned by the person against whom the tax is assessed." (Italics ours.) Thus we have this question squarely presented: Where an assessment of personal property is lawfully and regularly made against a person in lawful possession but who is not its owner, can the tax be collected at all by the seizure and sale of the property?

We cannot overlook the far-reaching effect which the answer to this question must necessarily have on the collection of taxes on personal property in this state. There are many thousands of articles of personal property sold each year on conditional sales contracts and many more thousands held by nonowners under leases. They range all the way from articles of home furnishing of relatively small value to property of very considerable worth. To require the assessors to ferret out the legal owner of each of these pieces of personal property would place upon them a task almost impossible of fulfillment. To hold that the tax on personal property lawfully assessed to its possessor could not be collected by its seizure and sale would surely result in the escape from taxation by many, as no other adequately workable means for collecting these taxes is given by the law. We should not reach such a result unless there is open no avenue of escape from it, as it is the fundamental law in California that the burden of the support of government shall be equally spread and that "all property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as pro-

vided by law, or as hereinafter provided." Article 13, § 1, Const.

[3-5] While it is true that statutes under which taxes are levied for public purposes are to be strictly construed in favor of the individual and against the taxing power it is equally true that language must not be given an unnatural construction in order to defeat the tax legislation nor the plain intent of legislation disregarded. *Riley v. Havens*, 193 Cal. 432, 225 P. 275. It is also true that the courts, when the language will reasonably permit, will so construe statutes that they may become operative rather than give a construction that will defeat them. Section 3541, Civ. Code; *Glassell Development Co. v. Citizens' National Bank*, 191 Cal. 375, 216 P. 1012, 28 A. L. R. 1427. The Codes must be construed together and harmonized wherever possible. Section 4480, Pol. Code; *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 P. 303.

[6, 7] With these fundamental rules in mind we must proceed to the task of determining the intention of the Legislature in clearly providing that personal property could be assessed to its lawful possessor, a valid lien thereby created upon it with no workable machinery provided to foreclose the lien if section 3821 of the Political Code does not permit the summary seizure and sale of the property so assessed. In other words, we must determine what limitation the Legislature placed upon the powers of the assessor when it provided that he could seize and sell *personal property owned by the person against whom the tax is assessed* and at the same time gave him no express power to seize and sell property assessed to its lawful possessor.

In approaching this problem we are well aware of one useful definition of the owner of property as "one who has dominion of a thing, real or personal, corporeal or incorporeal, which he has the right to enjoy and to do with as he pleases—either to spoil or destroy it as far as the law permits—unless he be prevented by some agreement or covenant which restrains his right." 6 Words and Phrases, First Series, 5135, and cases cited.

A broader interpretation of the term "owner" was given by this court in the case of *Lindsay-Strathmore Irrigation District v. Wutchumna Water Co.*, 111 Cal. App. 688, 296 P. 933, 938, where it is said: "As was said by the Supreme Court in the case of *Miller v. Imperial Water Co.*, 156 Cal. 27, 103 P. 227, 229, 24 L. R. A. (N. S.) 372. "The terms "owning," "owner," "owned" depend somewhat for

their signification upon the connection in which they are used. They are not technical, but general terms, and are therefore liberally construed; "the precise meaning depending upon the nature of the subject-matter and the connection in which" they are used." There the plaintiff was the owner of stock in the defendant whose by-laws provided that water should be delivered to owners of its stock and refused to deliver water to the owners of land within the plaintiff district because they were not owners of defendant's stock. It was held that the definition of the clause in question should be broad enough to include the owners of land in the plaintiff district even though they were not individually owners of defendant's stock.

In the case of *Texas Bank & Trust Co. of Beaumont v. Smith*, 108 Tex. 265, 192 S. W. 533, 2 A. L. R. 771, it was held that while the term "owner" as generally used signifies a person who has the legal title to property, still under a statute giving a paramount lien for water furnished lands for irrigation, the term was held to include both the owner of the legal title and the tenant in possession.

The following cases support the conclusion that the terms "owner" and "owned" may be so defined as to include a person possessing such interest in property that he has lawful possession of it: *Wyatt v. Beard*, 179 Ark. 305, 15 S.W.(2d) 990; *Ehlers v. Chicago, B. & Q. R. Co.*, 118 Neb. 477, 225 N. W. 468; *McLevis v. St. Paul Fire & Marine Ins. Co.*, 165 Minn. 468, 206 N. W. 940; *Fraser v. Hawkins*, 137 Ark. 214, 208 S. W. 296; *Rule v. Sioux County*, 94 Neb. 736, 144 N. W. 806; *Matter of City of New York (In re Water Front in Tompkinsville, Borough of Richmond)* 219 App. Div. 387, 220 N. Y. S. 23; *Dunbar v. Texas Irrigation Dist.* (Tex. Civ. App.) 195 S. W. 614; *Cayce Land Co. v. Southern R. Co.*, 111 S. C. 115, 96 S. E. 725; *McGowan v. Morgan*, 160 App. Div. 588, 145 N. Y. S. 787; *Wisconsin River Log-Driving Ass'n v. D. F. Comstock Lumber Co.*, 72 Wis. 464, 40 N. W. 146, 1 L. R. A. 717; *Payne v. Sheets*, 75 Vt. 335, 55 A. 656; *Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co.*, 84 S. C. 306, 66 S. E. 194; *Commonwealth v. Smith & McGuilar*, 127 Ky. 171, 105 S. W. 397; *Convis v. Citizens' Mutual Fire Ins. Co.*, 127 Mich. 616, 86 N. W. 994.

We, therefore, conclude that the term "owner" may include others than the possessor of the legal title to property and is often used to designate persons in legal possession. From this premise and the fact that it would have been a futile act on the part of the

Legislature to empower the assessor to assess personal property to its lawful possessor and provide no efficiently workable means of collecting the tax computed on such assessment after it was legally made, we are of the opinion that when the Legislature used the word "owned" in section 3821 of the Political Code it had in mind its broader definition and intended to give the assessor the power of seizure and sale of personal property lawfully assessed under the provisions of section 3628 of that Code.

[8] Plaintiff urges that the assessor could have learned the true owner of the property by inspecting markings upon it. This may be true, but there is no showing that he actually knew of these markings. Furthermore, if we are correct in our interpretation of the sections of the Political Code under consideration, unsecured personal property may be assessed to either its legal owner or its lawful possessor.

[9] Plaintiff advances as further grounds for a reversal of the judgment (1) that the sale was void for the reason that it was made for the purpose of collecting taxes assessed in more than one year before the seizure and sale, and (2) the sale should be set aside because of the gross inadequacy of the price bid by defendant.

We do not understand that the property was assessed at all during the fiscal year preceding its sale. While the bill of sale given defendant is inartistically drawn, we think the record justifies the conclusion that the property having escaped assessment in the preceding fiscal year, it was given a double assessment in the year of its sale in accordance with the provisions of section 3649 of the Political Code.

[10] We do not believe that the price which was bid and paid can be controlling in cases of this kind. The law contemplates that the selling price shall at least equal the tax, penalties and costs. The sale is for the benefit of the taxing body and it is expected that the price will bring it out whole. This is the first concern in tax sales and not that the owner may receive the reasonable value of his property. If this were required there would be few bidders at tax sales because of the uncertainty of the title given and the probability of expensive litigation testing that title. The books are full of cases in which tax titles have been held void.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

5 Cal.App.2d 439

LA RUE et al. v. POWELL et al.

Civ. 9295.

District Court of Appeal, Second District,
Division 2, California,
March 22, 1935.

Hearing Denied by Supreme Court
May 20, 1935.

Trial ⇐296(8)

Formula instruction undertaking to state conditions on which verdict might be returned for plaintiffs in action for death arising from automobile collision *held* reversible error, and not cured by inconsistent instructions, because not stating all essential conditions (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Tillman La Rue and others against Samuel Powell and others. From a judgment for plaintiffs, defendants appeal.

Reversed.

Davis & Thorne, of Los Angeles, for appellants.

P. E. Cavaney, of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal from a judgment for damages for personal injuries arising out of an automobile accident. The appellants' first contention and the one upon which they place greatest emphasis is that the court erred in giving an instruction which by its terms purported to state the conditions necessary to a verdict and yet did not state all of those conditions but on the contrary overlooked the element of proximate cause and the defense of contributory negligence. The instruction complained of reads as follows: "You are further instructed that Martin La Rue and Tillman La Rue are minor children of Thomas M. La Rue and Julia A. La Rue, and are among the plaintiffs in this case. If you should find that the defendants are guilty of contributory negligence and that said minor, Tillman La Rue, is in no way connected with any negligence on the part of said Martin La Rue, then your verdict should be for the plaintiffs and Tillman La Rue, on their action for damages for the wrongful death of his mother, Julia A. La Rue."

"The authorities are legion to the effect that a so-called 'formula' instruction must contain all the elements essential to a recov-

ery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law. This principle is well stated in *Beyerle v. Clift*, 59 Cal. App. 7, 9, 209 P. 1015, 1016, wherein it is held that: 'If an instruction by its terms purports to state the conditions necessary to a verdict, it must state all those conditions. * * *' *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 264 P. 237, 238. We think it is obvious that the above instruction is fatally defective, and although there are instructions inconsistent with it we are satisfied they do not correct the evil. The instruction practically deprives the defendant of a trial by jury under the negligence laws of the state, and section 4½ of article 6 of the Constitution does not apply to such a situation. The case must be reversed, and therefore there is no need for consideration of the several other points raised by this appeal.

Judgment reversed.

I concur: STEPHENS, P. J.



5 Cal.App.2d 477

JESSEN v. ANGELUS FURNITURE & MFG.

CO. et al.

Civ. 5296.

District Court of Appeal, Third District,
California,

March 23, 1935.

Hearing Denied by Supreme Court
May 20, 1935.

1. Appeal and error ⇐1011(1)

Appellate court must affirm judgment, attacked as unsupported by and contrary to evidence, where evidence was conflicting.

2. Automobiles ⇐244(14)

Evidence in action for damages resulting from collision of defendant's truck, driven by codefendant, with unlighted rear end of trailer, attached to plaintiff's parked truck, on dark night, *held* sufficient to support court's findings and judgment for defendants (St. 1931, p. 2128, § 136).

There was evidence that load of trailer was covered with gray canvas; that driver of plaintiff's truck stopped and parked it and trailer with rear end of latter overlapping paved and improved main-traveled portion of highway in vio-

lation of Vehicle Act (St. 1923, p. 561, § 136, as amended by St. 1931, p. 2128); that trailer was not equipped with lighted tail lamp; and that defendant, driving codefendant's truck in same direction at about 30 miles an hour, failed to observe parked vehicles because of darkness, gray canvas, and absence of lighted tail lamp.

3. Automobiles ⇨245(17)

Truck driver, parking truck and trailer, load of which was covered by gray canvas, with rear end of trailer, not equipped with lighted tail lamp, overlapping main-traveled portion of highway, on dark night, *held* not, as matter of law, free from negligence rendering truck owner liable for damage to truck colliding with rear end of trailer (St. 1931, p. 2128, § 136).

4. Automobiles ⇨245(83)

Driver of truck, colliding with trailer, parked without lighted tail lamp, with rear end overlapping main-traveled portion of highway, on dark night, *held* not contributorily negligent as matter of law (St. 1931, p. 2128, § 136).

5. Appeal and error ⇨931(1)

Appellate court must assume on appeal from judgment awarding cross-complainant damages for injuries to truck colliding with rear end of trailer, attached to plaintiff's parked truck, on dark night, that evidence was sufficient to prove affirmatively that collision resulted from negligence of driver of plaintiff's truck (St. 1931, p. 2128, § 136).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by George Jessen against the Angelus Furniture & Manufacturing Company and another, in which named defendant filed a cross-complaint against plaintiff. From a judgment for defendants and cross-complainant, plaintiff and cross-defendant appeals. On defendants' motion to dismiss the appeal or affirm the judgment.

Judgment affirmed.

Ray W. Hays, of Fresno, and Elbert E. Hensley, of Los Angeles, for appellant.

C. Ray Robinson, of Merced, and Young & Young, of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have moved to dismiss the appeal or affirm the judgment which was rendered against the plaintiff and cross-defend-

ant upon an answer and cross-complaint for damages resulting from an automobile collision. The motion is made pursuant to rule V, section 3, of the Rules of the Supreme Court and of the District Courts of Appeal on the ground that the appeal was taken for delay only and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The only grounds for reversal of the judgment assigned by the appellant in his opening brief are that the judgment is not supported by the evidence, and that as a matter of law it appears from the record that the plaintiff was not guilty of negligence which proximately contributed to the accident and upon the contrary that the defendants were guilty of contributory negligence.

[1-5] The appeal is without substantial merit. Upon both points relied upon by the appellant the evidence is conflicting, and according to the well-established rule in that regard it becomes imperative for this court to affirm the judgment. While it is true that there is a conflict of evidence, there is substantial proof that on a dark night W. N. Warner, the agent of plaintiff, was driving a truck and trailer loaded with raisins northerly along the public highway in the vicinity of Delhi; that the load of the trailer was covered with a gray canvas which helped to obscure a clear view of the vehicle; that the driver of the plaintiff's truck and trailer stopped his machine with the impression that he had sustained a punctured tire; that he parked his truck and trailer contrary to the provisions of section 136 of the California Vehicle Act (St. 1923, p. 561, § 136, as amended by St. 1931, p. 2128), with the rear end of the trailer overlapping the paved and improved main-traveled portion of the highway, when there was ample room to have driven out upon the shoulder of the roadway, and that the rear end of the trailer was not then equipped with a lighted tail lamp. Ray Stark, who was driving a Mack truck belonging to the defendant and cross-complainant Angelus Furniture & Manufacturing Company in the same direction along the Golden State highway at a rate of speed of about thirty miles an hour, testified that he failed to observe the plaintiff's parked vehicles on account of the darkness of the night, because the trailer was covered with a dark gray canvas and for the reason that the trailer had no lighted tail lamp. The Mack truck collided with the rear end of the trailer belonging to plaintiff, thereby causing the damages to the cross-defend-

ant's machine for the compensation of which the judgment was rendered.

The cause was tried by the court sitting without a jury. Findings were adopted by the court favorable to the defendants and cross-complainant on every material issue. A judgment for damages in the sum of \$1,787 was accordingly rendered in favor of the cross-complainant. The appellant's argument regarding the weight and sufficiency of the evidence is unavailing in view of the uniform rule on appeal when the evidence is conflicting. The findings and judgment are adequately supported by the evidence. We are unable to hold as a matter of law either that the plaintiff was free from negligence or that the defendants and cross-complainant were guilty of contributory negligence. Upon the contrary we must assume from the record that there is sufficient evidence to affirmatively prove that the collision occurred as a result of the negligence of the plaintiff's agent. Further argument upon these questions would be useless.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



5 Cal.App.2d 441

STRICKLER CO. v. EISNER et al.
Civ. 9316.

District Court of Appeal, Second District,
Division 2, California.
March 22, 1935.

1. Mortgages ⇨218

Provision of lease that whole amount of rent required to be paid by lessees shall be declared to be first and prior liens to interest of lessees held not to provide for "mortgage" so as to preclude money judgment for rent before foreclosure of mortgage, where lien was not placed against any property and provision undertook merely to declare that lessor's rights to rents were prior to interests of lessees (Civ. Code, § 2920; Code Civ. Proc. § 726).

[Ed. Note.—For other definitions of "Mortgage," see Words & Phrases.]

2. Appeal and error ⇨907(2)

Where evidence was not before appellate court and entire lease was not set out in findings or complaint, trial court's findings,

in light of entire lease, that there was no mortgage between parties so as to preclude money judgment for rent before foreclosure of mortgage, held conclusive, since appellate court would presume that entire lease, if before court, would support findings.

3. Pleading ⇨279(3)

In action for rent, permitting plaintiff to file supplemental complaint which set up installments of rent which had accrued after date of filing of original complaint held not error, since, where contract sued on provides for payments in installments, supplemental pleading may be filed to cover installments accruing after suit is filed.

4. Pleading ⇨279(4)

In action for rent, permitting plaintiff to file supplemental complaint which set up installments of rent which had accrued after date of filing of original complaint held discretionary, notwithstanding each installment of rent as it became due constituted a new cause of action, where consolidation of successive actions did not prejudice lessee's rights (Code Civ. Proc. § 1048).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Strickler Company against I. Eisner, Long Beach Holding Corporation, and others. From a judgment for plaintiff, second-named defendant appeals.

Affirmed.

Louis M. Lissner and I. H. Prinzmetal, both of Los Angeles, and Lester R. Slonecker, of Long Beach, for appellant.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, for respondent.

CRAIL, Justice.

[1] This is an appeal from a judgment in favor of the plaintiff in an action to recover installments of rent, also taxes and attorneys' fees, alleged to be due under the terms of a written lease. The appeal is presented upon the judgment roll alone, and the evidence is not before us. The contention of the appellant is that it affirmatively appears on the face of the findings that the obligations upon which the suit was brought were secured by a mortgage and that plaintiff is not entitled to obtain a money judgment against the appellant unless it forecloses said mortgage in accordance with section 726, Code Civ. Proc. The claim that there is a mortgage is based upon the language of paragraph 12 of the lease, which paragraph, but not the

entire lease, was set out in the complaint, and which reads in part as follows: "That the whole amount of rent reserved hereunder and required to be paid by the lessees * * * shall be and are hereby declared to be first and prior liens to the interest of the lessees under this lease," etc. This falls far short of being a mortgage. In the first place, the so-called lien is not placed against any specific property or against any property. A lien to be a mortgage must be upon specific property. Section 2920, Civ. Code. In the second place, while the word "lien" is used, it is apparent from the manner in which it is used that the language undertakes to declare merely that the lessor's rights to the rents are prior to the interests of the lessees under the lease. As the trial judge well said in a memorandum opinion: "It appears to me that the intention of the parties as expressed in the language of the paragraphs in question, *considered in the light of the other paragraphs*, was to establish the order and priority of the right to receive the rents in relation to other liens or claims subsequently attaching, rather than to create a lien on defendant's lessee's leasehold as security for the rent."

[2] This brings us to a further and complete answer to appellant's contention. The trial court considered this provision of the lease "in the light of the other paragraphs." And thereupon it found that there was no mortgage between the parties. As already stated, the evidence is not before us and the entire lease is not set out in the findings or complaint; therefore we are bound to presume that the lease as a whole, if before us, would support the findings.

[3] Appellant's second contention is that the trial court erred "in permitting the respondent to file its supplemental complaint for causes of action which were alleged to have accrued against appellant subsequent to the filing of the original complaint." The court did permit the filing of a supplemental complaint which set up installments of rent which had accrued after the date of the filing of the original complaint, also taxes paid and attorneys' fees, all of which were proper charges under the terms of the lease. While our attention has not been called to a precedent in which the courts of this state have had occasion to consider this precise question, there is no lack of authority sustaining the court's action in analogous situations. *Washburn v. Wilkinson*, 59 Cal. 538; *Valensin v. Valensin*, 73 Cal. 106, 14 P. 397. "Where a contract sued on provides for pay-

ments in installments, a supplemental pleading may be filed to cover those installments accruing after suit filed." *Bancroft's Code Pleading*, § 459, p. 662. Such a rule has been adopted in other jurisdictions (*Sigler v. Gordon*, 68 Iowa, 441, 27 N. W. 372; *Pickerill v. Home Realty Co.*, 79 Ind. App. 447, 136 N. E. 850; *Jordan v. Indianapolis Water Co.*, 159 Ind. 337, 64 N. E. 680; *May Stores, Inc., v. Bishop*, 131 Or. 670, 282 P. 1080), and such a rule in this state would tend to save a multiplicity of actions.

[4] Assuming, however, that each installment of rent as it became due constituted a new cause of action, nevertheless these successive actions arose out of the same contract. In each case the court had jurisdiction over the parties and the subject of the action. Such actions may be consolidated in the discretion of the court whenever it can be done without prejudice to a substantial right (section 1048, Code Civ. Proc.) and the consolidation of these successive actions in no wise prejudiced the rights of appellant. Finally, the appellant sets forth six different grounds upon which he contends his special demurrer should have been sustained. We have examined all of these and, we find that the contentions are without merit.

Judgment affirmed.

I concur: STEPHENS, P. J.



5 Cal.App.2d 320

CARVER v. FITZSIMMONS.

Civ. 8946.

District Court of Appeal, Second District,
Division 1, California.

March 18, 1935.

1. Contracts ☞ 171 (2)

Under contract calling in part for personal services, where services promised are not essential to substantial performance, and it appears that parties intend in certain events to substitute services of others, several obligations will be held independent of each other, and disability will excuse failure to perform services, but will not discharge contract in toto.

2. Principal and agent ☞ 46

Provision in contract for organization of chain of stores by highly trained executive

and advancement of funds by plaintiff held to contemplate rendition of personal services by executive and to be interrelated with provision to indemnify plaintiff for any losses if business was liquidated within three years, so that on death of executive entire contract was discharged, including indemnity provision.

3. Master and servant §27, 28

Where all obligations of contract were undertaken in contemplation of rendition of services by one party to the contract, there will be read into contract implied agreement that all obligations were to be terminated in event death or disability of such party rendered it impossible to carry into effect purposes the venture was designed to accomplish.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by K. L. Carver against Anna Fitzsimmons, as administratrix of the estate of James Fitzsimmons, also known as James J. Fitzsimmons, deceased. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Harry J. McClean, of Los Angeles, for appellant.

Joseph Scott and Theodore C. Heyl, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff appeals from a judgment of nonsuit in an action brought on a claim against the estate of Fitzsimmons, which claim arose out of the following transaction:

On March 11, 1931, plaintiff advanced to Fitzsimmons the sum of \$25,000 under written agreement which provided that the money should be used to acquire the capital stock of a corporation to be organized in the state of Oregon for the purpose of installing and operating a chain of grocery stores in the states of Oregon and Washington. The agreement provided that Fitzsimmons would cause a corporation to be organized with a capital of 5,000 shares of stock without par value; that \$25,000 would be paid to the corporation in return for 2,050 shares, of which 50 shares were to go to employees and the remainder to Carver, one-half thereof to belong to him and one-half to be held subject to the right of Fitzsimmons to acquire the same in the following manner: That for each \$2,500 earned by the corporation, and set aside as surplus, Fitzsimmons should have the right to delivery of 100 shares of the stock held by

Carver until he had acquired 1,000 shares by reason of the fact that the surplus of the corporation had reached a total of \$25,000, whereupon Carver and Fitzsimmons would each own 1,000 shares of stock. It was also agreed that the contracting parties would use their best efforts to see that the corporation earned and declared specified quarterly dividends, and that neither of the parties should be paid any salary or other compensation for services until the surplus of the corporation amounted to \$25,000. The agreement provided as follows:

"It is the intent and purpose of the parties hereto that the management and control of said corporation be in the hands of second party and that second party operate, manage and control the business of the corporation to the best interests of both parties hereto, * * *;" and further provided as follows: "If on April 1st, 1932, the profit and loss statement of the corporation shall not disclose net earnings for the previous six months' period equal to at least two (2) quarterly dividends as hereinbefore provided, or if, during any succeeding six months' period said profit and loss statement shall not disclose earnings equal to two (2) such quarterly dividends, it is agreed that the business of said corporation shall be liquidated as soon as practicable, unless the parties hereto mutually consent to the continuance thereof. If said corporation shall liquidate its business within three (3) years from date hereof and first party shall not have realized an amount equal to the principal sum invested by him, plus interest thereon at the rate of 7% per annum from October 1st, 1931, to the date of receipt by him of his proportion, on final distribution, of the assets of said corporation, second party shall bear and pay to first party one-half the difference between said principal sum invested (\$25,000), plus interest thereon as aforesaid, and the aggregate amount which first party shall receive from said corporation in the form of dividends, or upon liquidation."

Upon receipt of the money, Fitzsimmons proceeded to Portland, where he caused the corporation to be organized and stock to be issued as agreed, he becoming president of the corporation. He thereupon selected locations for stores and entered into five leases, one in Portland and four in Seattle and West Seattle, in which locations stores were opened. The first store was opened May 2, 1931, and the others shortly thereafter. Fitzsimmons died May 12, 1931. The stores

were operated by the corporation until the early part of the following year when they were liquidated, and in this operation the entire capital was lost with the exception of \$548.15. The claim upon which this action is founded arises out of the provision of the contract heretofore quoted by which Fitzsimmons agreed to indemnify Carver to the extent of one-half of the losses sustained by the latter upon liquidation of the business. After proof of the foregoing facts, the trial court granted defendant's motion for a nonsuit, placing the ruling upon the ground that the contract was one calling for the personal services of Fitzsimmons, the obligations of which were terminated by his death.

This ruling presents the only assignment of error upon this appeal. In approaching this question, it is necessary to refer to certain of the circumstances surrounding the making of the contract and which are proper to consider in reaching a true construction of the provisions above quoted.

Both of the contracting parties lived in Los Angeles. Fitzsimmons for some fifteen years had been either an employee, vice president or other officer of the Atlantic and Pacific Tea Company, operating stores throughout the United States. After severing his connection with that company, he came to Los Angeles, where he opened and operated chain grocery stores. In March, 1931, he was operating thirty-five stores of his own in Los Angeles and was general manager of a company operating some 250 chain stores in the same locality, known as the Continental Stores. These stores were managed by store managers, above whom were supervisors and assistant supervisors, whose superiors were officers of the corporation. One Irving was acting in the capacity of supervisor. He accompanied Mr Fitzsimmons on the trip north when the five stores were opened, became president of the corporation upon the death of Fitzsimmons, and thereafter had general charge of the operation of the stores. After Fitzsimmons' death, Carver sent north a representative, who theretofore had had no experience in the management or the operation of a grocery store, to represent him in the operation and ultimate liquidation of the business. Defendant as executrix of the estate of Fitzsimmons had no part either in running or winding up the business of the corporation.

[1] The questions presented are these: Was the obligation of Fitzsimmons to render services a basic and essential consideration for the contract or merely incidental thereto, and was the obligation of Fitzsimmons to

indemnify Carver independent of and severable from the other terms and provisions thereof?

If the continued service of Fitzsimmons in the management and operation of the business was the basis and foundation of the contract, the obligations he assumed were strictly personal and not binding on his estate. Such was the case in *Marvel v. Phillips*, 162 Mass. 390, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. Rep. 370, relied upon by respondent. It was there held that an agreement to advance money for the purpose of obtaining letters-patent and to manage and build up a business, founded on the patent rights, involved personal undertakings requiring skill, attention and ability of a high order, and that the personal service was one of the principal things contracted for. Accordingly, it was held that the death of the promisor, rendering performance impossible, terminated the obligation to advance further sums of money and discharged the contract.

If, upon the other hand, the agreement of Fitzsimmons to render services to the corporation was not a controlling factor, but was merely incidental to other features of the joint enterprise, the contract was not discharged by his death, and the indemnity obligation is a charge against his estate. Where the personal services promised are not essential to substantial performance of the contract, and it appears that the parties intended in certain events to substitute the services of others, the several obligations will be held to be independent of each other. In such a case, disability will excuse the failure to perform the services but will not discharge the contract in toto. *Chater v. S. F. Sugar Refining Co.*, 19 Cal. 219, 220, gives a typical illustration of this rule. This case is relied upon strongly by appellant, but is not controlling here for the reason that under a contract, essentially different from the one we are considering, the court in that case held that the employment of a manager of the business created obligations that were independent of others, which were held to be enforceable notwithstanding the disability of the employee which terminated the obligation to render further services. *Janin v. Browne*, 59 Cal. 37, epitomizes the rules in a brief statement to the effect that the contract will be held personal only to the extent that it clearly appears from its language that it was intended that one of the parties should have the benefit of the personal services of the other. The law on the subject has been clearly defined from the time of the early English

cases to the effect that if one agrees to pay for personal services he is entitled to receive the exact thing he bargains for. He does not have to accept a substitute even though what is offered in substitution may be generally regarded as better than the original. The difficulty comes in the application of the law to specific cases wherein it becomes necessary for the court to take the viewpoints of the contracting parties and to determine what the exact bargain was. We experience no such difficulty, however, under the facts of this case, for it appears with certainty that both Carver and Fitzsimmons entered upon their mutual obligations with the distinct understanding that the one was buying and the other selling the personal services of Fitzsimmons. He was to manage, operate, and control the corporation—a most comprehensive undertaking. He brought to this task a wealth of knowledge and experience in a highly specialized and essentially modern method of selling merchandise. His abilities were exceptional and were undoubtedly so recognized by Carver. The argument that the services were of such a nature that they could have been as well performed by assistants or by a personal representative is not only unconvincing but unsound. Carver had a right to receive the particular services he contracted for, namely, the judgment, industry and fidelity of Fitzsimmons, which were fully as unique and incapable of duplication as are the services of artists, writers, or physicians. But the question of the degree of skill or ability of the person employed is important, not in determining whether the services can be duplicated, but in determining whether in a given case the promise to render personal service lies at the base of the contract. If it does, the contract ends with the termination of the services, because of death or disability, regardless of the fact that like services might be continued by another possessed of equal or even greater ability. The contract recites the fact that Fitzsimmons is possessed of "considerable experience in the organization, operation, and management of retail grocery stores." Even without such a recital the court would necessarily take such facts into consideration in construing the contract. It cannot be doubted that Carver was influenced to engage in the venture by reason of the fact that his investment would be under the continued management of Fitzsimmons. It was contemplated that the latter would manage the business in the event it was successful for not less than three years, for the parties fixed that period of time as the duration of Fitzsim-

mons' agreement to reimburse Carver to the extent of one-half of the losses sustained on the original investment. If, instead of making the investment in one sum, Carver had agreed to advance the money at different times, as separate stores were opened, he would clearly have had the right upon the death of Fitzsimmons to decline to make further advancements, since he no longer could have the advantage of Fitzsimmons' judgment in the selection of the cities and the particular locations in the cities where the stores were to be located, to say nothing of their subsequent management. The contract should not receive any different construction because all of the money was advanced at one time. The business was one to be carried on indefinitely; there was no limitation placed upon the number of stores that might eventually be operated, and there was no time fixed when the services of Fitzsimmons would be ended. It thus clearly appears that Carver was deprived of the principal thing he contracted for when the death of Fitzsimmons made further performance impossible.

[2, 3] What we have said shows that the personal services of Fitzsimmons were indispensable to such performance of the contract as would give Carver the full benefit of the obligations Fitzsimmons assumed. Another view of the case concerns the provision of the contract by which Fitzsimmons agreed to share one-half of Carver's losses. Since he agreed to manage the business, presumably for such time as he was able to perform such duties, the agreement was to share Carver's losses which might be sustained under his own management. It may not be assumed that he would have entered into the agreement to share the losses except upon the condition that the business would be under his own management. From the viewpoint of either of the parties, the personal services of Fitzsimmons were of such controlling importance as to justify the belief that they were not only of the essence of the contract, but that they furnished the only inducement to either of the parties to engage in the venture. They were the root of the agreement; all else was incidental. Such being the case, the several obligations of the parties were not independent; they were all undertaken in contemplation of a continuance of Fitzsimmons' services. In such a case the rule is that there will be read into the contract an implied agreement that all obligations were to be terminated in the event the death or disability of Fitzsimmons rendered it impossible to carry into effect the purposes the venture was

designed to accomplish. When the obligation to continue those services expired, the entire contract was discharged.

Plaintiff's case, consisting of proof of the foregoing facts, failed to establish a cause of action against defendant as executrix of the estate of Fitzsimmons. The judgment of nonsuit was proper, and is therefore affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



5 Cal.App.2d 327

O'CONNELL v. FEDERAL OUTFITTING CO., Inc.
Civ. 9659.

District Court of Appeal, First District,
Division 2, California.

March 19, 1935.

Hearing Denied by Supreme Court
May 16, 1935.

1. Appeal and error ⇨1071(1)

Conflict between finding that plaintiff performed in every detail all conditions of contract and expended certain sum of money in so doing, and finding that plaintiff did not expend any sum of money and did not render or perform any services for defendant required reversal.

2. Assignments ⇨89

Under provision of contract assigning accounts for collection that assignor might recall any accounts assigned, assignor held not required to notify each debtor that account had been taken out of assignee's hands to effect recall.

3. Contracts ⇨314

Where assignor refused to deliver to assignee originals of accounts assigned for collection on commission under contract and stated that assignor also would handle all assigned accounts, assignee could treat contract as repudiated and sue thereon for profit he had been prevented from realizing.

4. Contracts ⇨271

One who has been injured by breach of contract may treat contract as rescinded and recover upon quantum meruit so far as he has performed, or he may keep contract alive for benefit of both parties, being at all times ready and able to perform, or he may treat repudiation as putting an end to contract for all purposes of performance and sue for profits he would have realized if he had not been prevented from performing.

5. Appeal and error ⇨1177(8)

Judgment could not be ordered for assignee suing to recover profits he had been prevented from realizing under contract assigning accounts for collection on commission because of assignor's repudiation, notwithstanding finding that services were performed and costs incurred under contract, in view of conflicting finding that assignor did not expend any sum of money and did not render or perform any services for assignee.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by E. A. O'Connell against the Federal Outfitting Company, Incorporated. From a judgment in favor of the plaintiff and an order made after judgment denying plaintiff's motion for another and different judgment in plaintiff's favor, plaintiff appeals.

Judgment reversed, and order affirmed.

William P. Hubbard and Abraham Glicksberg, all of San Francisco, for appellant.

Edgar C. Levey, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff sought to recover \$29,167.23 on a written contract dated April 1, 1928, under which he and his partner were to make collections for the defendant and were to receive a commission therefor. The contract provided that the defendant might recall any accounts assigned to the plaintiff and his partner and agreed to pay full commission plus costs, where costs had been involved in the accounts recalled. In all other cases plaintiff and his partner were to bear costs. The plaintiff's partner assigned his rights under the contract to plaintiff, defendant was notified, and there was no objection made. Plaintiff continued to make the collections alone and in so doing incurred \$2,574.70 in costs and expenses. Between the months of September and December, 1931, defendant notified plaintiff that it would endeavor to collect the same accounts which had been assigned to plaintiff; it refused to deliver the originals of many obligations, without which judgment could not be taken against debtors; and it made statements to three persons to the effect that they should pay the defendant directly as plaintiff was no longer representing defendant. On December 31, 1931, plaintiff terminated the contract and brought this action, claiming commission and expenses on all of the accounts he had had. He

had judgment for \$99.13—commission on the accounts of the three persons above mentioned—and from this he presents two appeals, one, to review the judgment, and the other from the order made after judgment denying appellant's motion for another and different judgment in appellant's favor.

On the appeal from the judgment appellant grounds his attack upon the conflict in the findings of fact. He directs attention to findings numbered 3, 4, and 5 wherein it was found that plaintiff, through "solicitations, personal appeals, suits and otherwise" performed in every detail all the terms, covenants and conditions of the contract to be performed on his part and expended "as necessary costs and expenditures in making said collections, the aggregated sum of \$2,574.70." Then he calls attention to finding numbered 10, wherein it was found that "it is not true that plaintiff ever paid or laid out or expended any sum of money whatsoever for the defendant, or rendered or performed any services to or for defendant." The conflict between these two groups of findings cannot be reconciled.

Under the contract defendant agreed to pay plaintiff "25% on all collections" on certain cases; "50% on all collections" effected outside of San Francisco; and "50% on all collections" on certain classes of old accounts. It required the plaintiff to bear all costs of suit, except, where an account was recalled, the defendant agreed to reimburse plaintiff for such expenditures. Then section 4 of the contract reads: "The Federal Outfitting reserves the right to recall any account that they assigned to O'Connell and Nacht and in consideration the Federal Outfitting Co., agree to pay O'Connell and Nacht their full commission plus costs expended for each case thus recalled, where costs have been expended." Having agreed to reimburse plaintiff for "costs of suit" in section 3 of the contract, it would seem that the parties contemplated something different in section 4. A reasonable interpretation of this section is that the parties intended that the plaintiff should be paid the "full commission" earned on collections made to date of recall plus whatever costs had been expended in making such collections. It will be noted that the commission is not rated on the face of the account assigned but on the "collections" made. It is just as unreasonable to hold that, if the plaintiff should have paid \$7 in court costs on a \$500 account which is recalled, he should be entitled to the full commission on the whole account of which none had been collected, as to hold

that, if he had collected \$400 on the account without suit, he should receive nothing. But, aside from the question of the interpretation of the contract, we come back to the attack upon the findings of fact upon which the conclusions of law adverse to plaintiff must find their support.

[1] The legal liability of the defendant to pay for the services or to reimburse plaintiff for the costs incurred may be a debatable question and for that reason he was entitled to a finding of fact as to whether the services were or were not performed, and whether the costs were or were not incurred. But, in view of this conflict in the findings as to the essential facts involved, it was not possible for the court to draw a legal conclusion on the liability of the defendant and this would require a reversal of the judgment. *Darrah v. Lang*, 119 Cal. App. 552, 555, 6 P. (2d) 989; *Robb v. Cardoza*, 110 Cal. App. 116, 120, 293 P. 851; 2 Cal. Jur., p. 1030; 24 Cal. Jur. p. 965.

[2] Of a more serious nature is the attack upon the conclusions of law which denied recovery to plaintiff in face of the finding of full performance on his part. Though the defendant had reserved the right to recall all the accounts under certain conditions, he argues that there is no evidence to show that he exercised that privilege; and the trial court did not find that any accounts had been recalled except the three mentioned, for which plaintiff had judgment. It is unnecessary to decide what act would be required to effect a recall of an account. Manifestly it would not be necessary to notify the debtor in each instance that his account had been taken out of plaintiff's hands. But assuming, as we must in view of the findings, that no other recalls were made, then we are unable to reconcile the judgment with the specific finding of the fact of interference and repudiation appearing in finding numbered 7, which reads: "That between the months of September, 1931, and December, 1931, and after the transfer and assignment to plaintiff of such claims for collection, under the terms of said contract between plaintiff and defendant, and after plaintiff had devoted much time, and performed valuable services, and expended much money for expenses and for costs in attempting to make collections of all said claims, the defendant did notify plaintiff that it would proceed on its own account to make efforts to collect the same accounts, which it had previously assigned and transferred to plaintiff under said contract for collection, and did during said

time refuse to deliver to plaintiff the originals of many of the obligations of debtors, the collection of which had been assigned and transferred to plaintiff by defendant for collection, which said originals it was necessary for plaintiff to have, so that judgments could be taken against such debtors upon such obligations, and without which, judgments could not be taken. And defendant did during said time, and on separate occasions, make statements to each of several persons, to wit: Amelia Ramirez, Darwin P. Acheson and Edwin H. Pillsbury, whose claims defendant had so transferred to plaintiff for collection, under said contract between plaintiff and defendant to pay no money whatever to plaintiff upon their indebtedness to defendant, but to pay the same at all times to defendant, direct, for plaintiff was no longer representing defendant in the collection of its claims against debtors."

[3] The evidence supporting this finding is not controverted. Defendant's co-operation with plaintiff in the manner mentioned was found to be necessary to plaintiff's performance of the contract. Defendant not only refused co-operation, but expressly informed plaintiff that it would also handle all these assigned accounts. This was manifestly such an interference with plaintiff's rights under the contract as would defeat its purpose and render substantial performance by the plaintiff apparently impossible. 1 Restatement of the Law of Contracts, p. 475, § 318; 6 Cal. Jur., p. 457, § 273. Plaintiff was thereupon entitled to treat this as a repudiation, and accordingly gave notice of his termination of the contract.

[4] When a party to a contract has thus been injured by its breach, he may pursue any of three remedies. "He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In this last case, the contract would be continued in force for that purpose." *McConnell v. Corona City Water Co.*, 149 Cal. 60, 64, 85 P. 929, 930, 8 L. R. A. (N. S.) 1171. *Sobelman v. Maier*, 203 Cal. 1, 8, 262 P. 1087; 6 Cal. Jur., p. 460, § 274.

[5] Here the plaintiff elected to pursue the last of these remedies. One element of dam-

ages was proved to the satisfaction of the trial court as indicated by the finding covering his expenditures under the contract. 1 Restatement of the Law of Contracts, pp. 525, 528. But, because of the conflict between this finding and findings numbered 10 and 11, as above noted, we cannot direct a judgment on that issue, and, for the same reason, the trial court could not have ordered judgment for plaintiff on these findings.

For the reasons given the judgment is reversed, and the order is affirmed, with costs to appellant.

We concur: STURTEVANT, J.; SPENCE, J.



5 Cal.App.2d 483

WATERS et al. v. WOODS.

Civ. 5262.

District Court of Appeal, Third District,
California.

March 23, 1935.

1. Judgment ☞249

Party cannot be sent out of court merely because he has misconceived appropriate form of relief, provided facts shown entitle him to some relief either at law or in equity (Code Civ. Proc. § 307).

2. Election of remedies ☞12

Plaintiffs bringing action primarily for rescission of contract for exchange of properties on ground of fraud, with alternative prayer for damages, held not barred by election of remedies from recovering damages therein for fraud, though case was tried on theory of rescission, where plaintiffs were unable to reconvey property exchanged clear of debt and defendant was not prejudiced.

3. Election of remedies ☞11

Estoppel by election of remedies does not apply if party selecting one of two remedies has misconceived his remedy and remedy selected never was available.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Harold L. Waters and another against Fannie A. Woods. From an adverse judgment, plaintiffs appeal.

Reversed, with directions.

Marshall & Farnham, of Long Beach, for appellants.

Mason & Windham, of Long Beach, for respondent.

WOODWARD, Justice pro tem., delivered the opinion of the court.

This is an appeal by plaintiffs on the judgment roll. The question involved is whether the findings support the judgment, or, to put it another way, whether the trial court, after making findings that plaintiffs had been defrauded in an exchange of real property and had suffered damage thereby, was justified in denying them all relief merely because the action was primarily one for rescission and plaintiffs were unable to place defendants in a statu quo position.

The following findings are relied on by plaintiffs:

"IV. That it is true that during the period of the negotiations of the parties hereto leading up to and actually resulting in, the exchange of said properties, the defendant, well knowing the character, value and productiveness of said walnut grove, then and there falsely and fraudulently represented to the plaintiffs that said walnut grove had produced for the year next preceding said February 10th, 1931, a net income to defendant of One Thousand Six Hundred Dollars (\$1,600.00) from the marketing of walnuts produced on the property for said season; that said representation was false and was known by the defendant to be false, and was made by the defendant with intent to deceive plaintiffs and with intent to induce the plaintiffs to enter into said transaction.

"V. That it is true that the plaintiffs relied upon said representation so made by the defendant, believed it to be true, and, by reason thereof, consummated said exchange of properties on or about the 12th day of March, 1931, in accordance with said contract in the form of escrow instructions, above referred to; that had the plaintiffs had knowledge of the true facts, they would not have consummated said transaction. That plaintiffs, at the time of entering into said exchange of properties, were wholly inexperienced in the business of growing and marketing walnuts, and inexperienced and ignorant of values concerning walnut groves. That it is not true that the plaintiff's relied solely upon the representation of defendant as to crop proceeds.

"VI. That it is true that plaintiffs, for the first time, learned that said walnut grove

had produced approximately Five Hundred Dollars (\$500.00) in crop returns for the year 1930, after operating said walnut grove for the season of 1931 and marketing the walnut crop for said season.

"VII. That it is true that the reasonable market value of said walnut grove on the basis of the representation so made by the defendant at the time of said transaction was from Sixteen Thousand Dollars (\$16,000.00) to Twenty Thousand Dollars (\$20,000.00); that the reasonable market value of said grove based on the actual returns received by said defendant for the year 1930 was from Ten Thousand Dollars (\$10,000.00) to Twelve Thousand Dollars (\$12,000.00).

"VIII. That it is true that plaintiffs still possess said San Bernardino property transferred to them by the defendant, and the defendant still possesses said Long Beach property transferred to her by the plaintiffs.

"IX. That it is true that while plaintiffs are willing, they are not ready and able to reconvey said walnut grove to defendant clear of said encumbrance of Three Thousand Five Hundred Dollars (\$3,500.00)."

From the foregoing findings it appears that the court considered the evidence adduced at the trial as sufficient to establish deliberate fraud and deceit on the part of the defendant, but nevertheless denied plaintiffs relief because their action was for rescission and they were unable to reconvey the property they had taken free of debt. Parenthetically, it may be remarked in passing that the particular encumbrance which brought disaster to plaintiffs' case was a promissory note for \$3,500, secured by a deed of trust on the property they were acquiring. It seems that under the agreement of exchange plaintiffs were required to reduce the mortgaged indebtedness on their Long Beach property from \$14,500 to \$12,500. In order to do this they were forced to negotiate a loan, using the newly acquired walnut grove as security therefor. It also appears that after reducing the loan in the manner stated they retained the balance of the borrowed money. In addition to paying \$2,000 on said loan, they also, as a part of the consideration for the exchange of properties, gave defendant a note for \$4,000, securing it with a second deed of trust on the grove.

Appellants urge that the complaint, while primarily one for rescission, contains sufficient averments of fraud to justify a judgment for damages in the event a rescission could not be had. Respondent, on the other hand, points out that from the allegations of

the complaint it appears beyond all doubt that the intention of the pleaders was to state facts entitling them to rescission; and that, since disaffirmance of the contract and damages for fraud are inconsistent remedies, they were not entitled to rely on both but were compelled to make an election and thereafter stand throughout in the position they had chosen.

It is true, of course, that a complaint must be factually compatible with the relief sought; and in the instant case it seems patent that the pleader relied primarily on rescission, rather than damages, having set forth with meticulous care the elements of that equitable remedy. But it is likewise true that the averments of fact in a complaint may be so composite in character as to encompass a number of different remedies. Here we have precisely this situation. Plaintiffs' complaint is denominated as an action for "rescission, cancellation of instruments, and/or damages." All the elements of fraud are pleaded, namely: (1) That the defendant made a material representation of an existing fact, intending that plaintiffs should act upon it; (2) that the representation was false and known by the defendant to be so; (3) that plaintiffs believed such representation; and (4) that they acted upon it to their damage. As already pointed out, the trial court found that the fraud had been committed in the manner alleged in the complaint but denied relief because plaintiffs were unable to comply with one of the prerequisites of rescission.

[1] In this state there is but one form of civil action for the enforcement and protection of private rights, the formalism and subtle distinctions of common-law pleading being entirely disregarded. Section 307, Code of Civil Procedure. As declared by the Supreme Court in the early case of *Grain v. Aldrich*, 38 Cal. 514, 520, 99 Am. Dec. 423, and consistently adhered to ever since: "Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of Court, merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of Court only when, upon his facts, he is entitled to no relief, either at law or in equity."

In the case of *Martin v. Hall*, 219 Cal. 334, 335, 26 P.(2d) 288, decided more than sixty years later, we find the Supreme Court reiterating this salutary rule; as stated in the syllabus: "It is not essential that a com-

plaint state a cause of action for the relief which plaintiff seeks provided the facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled." See, also, *Nevada Land & Inv. Corp. v. Sistrunk*, 220 Cal. 174, 30 P.(2d) 389; *Zellner v. Wassman*, 184 Cal. 80, 193 P. 84; *Bancroft v. Woodward*, 183 Cal. 99, 190 P. 445, 446; *Brown v. Anderson-Cottonwood Irr. Dist.*, 183 Cal. 186, 190 P. 797; *Samuels v. Singer* (Cal. App.) 36 P.(2d) 1098; *Von Schrader v. Milton*, 96 Cal. App. 192, 273 P. 1074; *Hayden v. Collins*, 1 Cal. App. 259, 81 P. 1120.

[2, 3] The question here being considered was before this court in the cases of *Masero v. Bessolo*, 87 Cal. App. 262, 262 P. 61, and *Azareello v. Bessolo*, 87 Cal. App. 272, 262 P. 66, and the relief to which a plaintiff would be entitled was there dealt with at length, and the conclusion reached that in an action for the rescission of a deed of conveyance where the prayer, in addition to such specified relief, asked for any relief that might be just and equitable, and the defendant answers and goes to trial, and the pleadings and the evidence show a right in the plaintiff to recover judgment in damages, it was error to grant defendant's motion for nonsuit because the plaintiff failed to establish a right of rescission, and that such relief should be granted as the testimony warranted.

In the *Bancroft v. Woodward* Case, supra, the same point was involved as here, except that it arose from the allegations of an answer instead of a complaint. The court declared succinctly: "It could hardly be questioned, for example, that under a complaint which, by proper and sufficient averments, set out that the plaintiff had been induced by fraud to enter into a contract and had endeavored to rescind it because of such fraud, and prayed relief upon the basis of a rescission, the plaintiff might be accorded damages in case the fraud were found but under such circumstances that the right of rescission did not exist. To put the matter in another way, it is wholly inconsistent for a party defrauded to ask for damages first and a rescission if he cannot have them. But there is nothing inconsistent in his asking for rescission first and damages if he cannot have it." And that is exactly what the plaintiffs did in this case, notwithstanding the fact that they seemed to believe rescission to be their remedy.

Respondent relies on *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 58 P. 92, 61

P. 667, 668, as sustaining her contention. We do not so understand the case. There the plaintiffs pleaded an action for rescission, but later, on appeal, found it expedient to take the position that the complaint would support a judgment for damages and that averments pertaining exclusively to statutory rescission should be treated as surplusage. The Supreme Court held that "the facts proven do not show fraud, and plaintiffs could not recover in any form of action." This being true, the erudite observations of the court as to the distinctions between the two remedies can be of little comfort to the respondent. The case of Conlin v. Studebaker Bros. Co., 175 Cal. 395, 165 P. 1009, also cited, is equally inapposite. In that action the court merely stated the obvious proposition that a buyer who rescinds a contract for the purchase of an automobile may not recover the price paid and also retain the car, declaring that he must either rescind the contract, or affirm it and sue for damages. Nor do we perceive the applicability of Hines v. Brode, 168 Cal. 507, 143 P. 729, as the principal problem in that case was the true measure of damage under a complaint which "neither pleads in rescission, nor yet does it plead for damages after affirmance." The decision, however, does suggest that the complaint should be amended on retrial of the cause so that it could be known just which of two positions the plaintiff proposed to take. In the case now before us, the complaint, as already pointed out, sets forth the essential facts for either remedy and prays that if rescission cannot be had plaintiffs be awarded damages in the sum of \$20,000 and "for such other and further relief as to this court seems just and equitable."

Respondent urges that since the case was tried on the theory that rescission was the only relief open to plaintiffs, they made an irrevocable election of remedies and must accept the consequences of such choice. It is true that where the law allows two distinct modes of procedure on the same state of facts, one of which is inconsistent with the other, a party is compelled to choose between them. This is said to be an application or extension of the doctrine of estoppel. *Mailhes v. Investors Syndicate*, 220 Cal. 735, 32 P.(2d) 610. The rule, however, is grounded on the assumption that there are two or more procedural courses actually open to the party; if eventually it develops that such party misconceived his remedy and the one on

which he expected to rely had never been available, the estoppel does not apply. The rule is well stated in the case of *Agar v. Winslow*, 123 Cal. 587, 591, 56 P. 422, 423, 69 Am. St. Rep. 84: "Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts." Before one can exercise an option or preference between two things, both those things must have an actual existence. * * * If plaintiff was mistaken, and undertook to avail himself of a remedy that he was never entitled to, this does not prevent him from subsequently availing himself of a remedy that he is entitled to under the facts of the case." See, also, *Restatement of the Law of Contracts*, § 383; 20 *Corpus Jur.* 21; 9 *R. C. L.* 962.

In the instant case rescission was not available to plaintiffs because they were not in a position to reconvey the walnut grove clear of debt. This being true, it follows that they could not elect between two remedies when the facts of their case made only one of them available. In this connection it should be observed that the doctrine of election proceeds upon the theory that the inconsistent attitude of a party puts his adversary to some disadvantage and the disadvantage must be a real injury, "such as would, in contemplation of law, amount to a fraud upon the party invoking the estoppel." *Mansfield v. Pickwick Stages*, 191 Cal. 129, 215 P. 389, 390; *Campanella v. Campanella*, 204 Cal. 515, 269 P. 433. Defendant herein did not, so far as the record discloses, make any effort to compel an election. We fail to perceive any disadvantage to respondent by reason of plaintiffs' reliance on the cause of action for fraud. Her defense doubtless would have been the same. Respondent's contention that had she known plaintiffs would eventually shift their position she might have demanded a jury trial seems far-fetched. Perhaps this so-called shift of position should have been anticipated from the allegations of the complaint.

We do not believe that the findings support the judgment. Under the allegations of the complaint and the findings of the court, plaintiffs were entitled to relief.

The judgment is reversed, with directions to the trial court to retry the issue of damages only.

We concur: PLUMMER, J.; PULLEN, P. J.

5 Cal.App.2d 374

STATE BOARD OF EQUALIZATION OF CALIFORNIA et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9788.

District Court of Appeal, First District,
Division 1, California.

March 20, 1935.

Hearing Denied by Supreme Court
May 17, 1935.

1. Constitutional law ☞287
Intoxicating liquors ☞15

Citizen has no inherent right to sell intoxicants, and "license" to do so is not proprietary right within due process clause or a "contract," but is merely permit to do what would otherwise be unlawful; hence statute authorizing its revocation does not violate due process clause and license may be revoked without notice or hearing without invading any constitutional guaranties (Const. art. 1, § 13; art. 20, § 22, as amended in 1934).

[Ed. Note.—For other definitions of "Contract" and "License," see Words & Phrases.]

2. Statutes ☞190

Where statute is free from ambiguity, it needs no construction and will be enforced as written.

3. Intoxicating liquors ☞108(2)

State Board of Equalization, upon its own motion investigating manner in which licensees under Liquor Control Act were conducting their business, held authorized under act to revoke licenses without notice or hearing to licensees (St. 1933, p. 1703, § 19; Const. art. 1, § 13; art. 20, § 22, as amended in 1934).

4. Intoxicating liquors ☞108(1)

That State Board of Equalization may, upon its own motion, investigate licensees under Liquor Control Act and suspend or revoke licenses without notice or hearing, does not deprive licensee of a remedy where facts do not support board's action (St. 1933, p. 1703, § 19; Const. art. 1, § 13; art. 20, § 22, as amended in 1934).

5. Injunction ☞85(1)

Where validity of law is beyond question and powers of officer are plain, jurisdiction of court to issue injunction to restrain officer from exceeding his powers is limited by statute providing that injunction cannot be granted to prevent execution of public statute by officers for public benefit (Civ. Code, § 3423, subd. 4; Code Civ. Proc. § 526).

6. Injunction ☞136(2)

Temporary injunctions issued to restrain State Board of Equalization from interfering with conduct of business of licensees un-

der Liquor Control Act, whose licenses board, acting upon its own investigation had revoked, held unauthorized in view of unquestioned validity of law and of extent of powers of board (Civ. Code § 3423, subd. 4; Code Civ. Proc. § 526; St. 1933, p. 1697; Const. art. 1, § 13, art. 20, § 22, as amended in 1934).

7. Prohibition ☞3(5)

Where temporary injunctions issued to restrain State Board of Equalization from interfering with business of licensees under Liquor Control Act, whose licenses board had revoked, were unauthorized, prohibition held to lie to prevent further prosecution of actions by licensees seeking such relief, regardless of fact that appeal might be taken from judgment, where such appeal would not have afforded adequate remedy (Civ. Code, § 3423, subd. 4; Code Civ. Proc. § 526; St. 1933, p. 1697; p. 1700, § 5; p. 1703, § 19; Const. art. 20, § 22, as amended in 1934).

8. Mandamus ☞4(1)

Mandate cannot as a rule be employed as a corrective of error, except for an error of judicial discretion.

9. Prohibition ☞34

Where facts show lack of jurisdiction in court, appellate court will give such relief as record presented will warrant, notwithstanding general rule that, where alternative writ of mandate issues, petitioner is concluded by its terms.

Actions were instituted by Villard Wilmont Sloan, individually and doing business under the fictitious name and style of "Pirates' Cave," against the State Board of Equalization and others, and by Rainbow Tavern, Incorporated, against the State Board of Equalization, and temporary injunctions were granted plaintiffs enjoining defendants from interfering with the conduct of plaintiffs' business. On petition by the State Board of Equalization of the State of California and Fred E. Stewart and others, as members of the State Board of Equalization, for a peremptory writ of prohibition requiring the Superior Court of the State of California in and for the City and County of San Francisco and Honorable E. P. Shortall, Judge, to refrain from further proceedings in the actions.

Writ issued.

Hearing denied by Supreme Court; SHENK and THOMPSON, JJ., dissenting.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for petitioners.

Harry A. McKenzie, J. H. Sapiro, and Ray D. Williamson, all of San Francisco, for respondents.

PER CURIAM.

The State Board of Equalization granted to Villard W. Sloan, doing business under the name and style of "Pirates' Cave," and to the Rainbow Tavern, Inc., a corporation, licenses pursuant to the provisions of the State Liquor Control Act (St. 1933, p. 1697). Subsequently the board upon its own motion investigated the manner in which said licensees were conducting their business. Following this investigation the board revoked the licenses and gave notice thereof to the licensees. The licensees then brought in respondent court two actions to enjoin the board from interfering with the conduct of their business, and temporary injunctions were granted. The actions mentioned were entitled "Villard Wilmont Sloan, Individually and Doing Business under the Fictitious Name and Style of 'Pirates' Cave,' v. State Board of Equalization et al.," being action No. 256059 as shown by the register of actions in said court, and "Rainbow Tavern Inc., a Corporation, v. State Board of Equalization," being action No. 256060, as shown by said register of actions. The ground for injunctive relief was that no notice and no opportunity to be heard was given the licensees previous to the revocation of their licenses, and that in the absence thereof the board was without power to act in the manner stated.

The board claims in the present proceeding that in view of the undisputed facts the respondent court was without jurisdiction to enjoin the acts complained of, and that appropriate relief should be granted.

The State Liquor Control Act (St. 1933, p. 1703, § 19) provides that the board may upon its own motion, and shall, upon the verified complaint in writing of any person, investigate the action of any licensee, and shall have power to temporarily suspend or permanently revoke a license thereof for certain acts or omissions; and by section 22 of article 20 of the Constitution of the State of California, as amended in 1934, the board is also given direct power in its discretion to deny or revoke any specific liquor license if it shall determine for good cause that the continuance of such license would be contrary to public welfare or morals.

[1] Unlike the rule with respect to the right to deal in ordinary commodities considered in the numerous cases cited and relied upon by respondent, there is no inherent right in a citizen to sell intoxicants (*Ritz v. Lightston*, 10 Cal. App. 685, 103 P. 363; *Foster v. Board of Police Commissioners*, 102

Cal. 483, 37 P. 763, 41 Am. St. Rep. 194); and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution (Const. art. 1, § 13), nor is it a contract (*Hevren v. Reed*, 126 Cal. 219, 58 P. 536); it is but a permit to do what would otherwise be unlawful, and consequently a statute authorizing its revocation does not violate the due process clause, and it may be revoked without notice or hearing without invading any constitutional guaranties. 33 Cor. Jur., Intoxicants, § 91, p. 532; 37 Cor. Jur., Licenses, § 112, p. 248; *Wallace v. Mayor of City of Reno*, 27 Nev. 71, 73 P. 528, 63 L. R. A. 337, 103 Am. St. Rep. 747; *Martin v. State*, 23 Neb. 371, 36 N. W. 554; *Sprayberry v. City of Atlanta*, 87 Ga. 120, 13 S. E. 197.

[2-4] The Liquor Control Act requires that upon filing with the board of a verified complaint in writing by any person the board shall investigate the action of any licensee. The act further provides in such cases for the issuance of a citation to the licensee, for an answer by him, and a hearing thereon. As stated, the licensees in the actions before the respondent court contended, and they now contend that the same rule applies where the board acts upon its own motion.

We cannot agree with this contention. Neither the act nor the Constitution purports to require a notice or a hearing in cases where the board proceeds independently; and to so hold would be to read into the statute requirements not warranted by its language. Where a statute is free from ambiguity and uncertainty it needs no construction and will be enforced as written. 23 Cal. Jur., Stats., § 103, p. 721. It was clearly the intention of the lawmakers that when the board, upon an independent investigation, should be in possession of facts sufficient to support the conclusion that a licensee has been guilty of acts or omissions which are grounds for revocation or suspension of the license, it may make an appropriate order without notice or hearing.

This, of course, does not mean that a licensee is without remedy where the facts do not support the action of the board. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35; *Brecheen v. Riley*, 187 Cal. 121, 200 P. 1042; *Bley v. Board of Dental Examiners*, 87 Cal. App. 193, 261 P. 1036; *Bold v. Board of Medical Examiners*, 133 Cal. App. 23, 23 P.(2d) 826.

[5-7] It has been held that an injunction may issue restraining a public officer, act-

ing under the special authority of a statute which prescribes a particular method in which he shall perform his duties, from exceeding his powers (*Cowell v. Martin*, 43 Cal. 605), or where the invalidity of the statute under which he is acting is shown. *Reclamation Dist. v. Superior Court*, 171 Cal. 672, 154 P. 845. But, where, as here, the validity of a law is beyond question and the powers of the board are plain, the jurisdiction of a court to issue an injunction is limited by subdivision 4 of section 3423 of the Civil Code, which provides that an injunction cannot be granted to prevent the execution of a public statute by officers of the law for the public benefit. Code Civ. Proc. § 526. Therefore the temporary injunctions heretofore issued by the respondent court were ineffectual, and prohibition will lie to prevent the further prosecution of an action seeking such relief although an appeal might be taken from the judgment, if the appeal would not afford an adequate remedy. *Reclamation Dist. v. Superior Court*, supra; *Wright v. Jordan*, 192 Cal. 704, 221 P. 915; *Riedman v. Brison*, 217 Cal. 383, 386, 18 P.(2d) 947.

The members of the board are public officers with all the powers of police officers in enforcing the provisions of the act. Section 5, State Liquor Control Act (St. 1933, p. 1700). It further appears that numerous cases involving facts similar to those pending in respondent court have been acted upon and are now elsewhere pending, and that it is essential to the public interest that the questions here presented be speedily determined, and that the remedy by appeal would in the circumstances be inadequate.

[8, 9] The petitioners filed herein a petition by which a writ of mandate was sought to compel respondent court to set aside the injunctions and dismiss the said actions. As urged by respondents, mandate cannot as a rule be employed as a corrective of error (*People v. Sexton*, 37 Cal. 532; *Hayward v. Superior Court*, 130 Cal. App. 607, 20 P.(2d) 348; *Funfar v. Superior Court*, 107 Cal. App. 488, 290 P. 626; *Hilmer v. Superior Court*, 220 Cal. 71, 29 P.(2d) 175], an exception being an error of judicial discretion, where in some instances the writ has issued. 16 Cal. Jur., *Mandamus*, § 35, p. 823. However, we are of the opinion that the facts—all of which are before us—show a lack of jurisdiction and make proper the issuance of a writ of prohibition, as it is well settled that in such cases the court will give

such relief as the record presented will warrant. *Swim v. Superior Court*, 193 Cal. 539, 226 P. 2; *Finn v. Butler*, 195 Cal. 759, 766, 235 P. 992; *A. G. Col Co. v. Superior Court*, 196 Cal. 604, 238 P. 926; *Board of Trustees v. State Board of Equalization*, 1 Cal. (2d) 784, 37 P.(2d) 84; *Hale v. Barker*, 70 Utah, 284, 259 P. 928. And this may be done in a proper case notwithstanding the general rule that where an alternative writ of mandate issues the petitioner is concluded by its terms, as this rule will not be enforced regardless of circumstances but in consonance with principles of fairness and justice. 16 Cal. Jur., *Mandamus*, § 78, p. 883; *Larkin v. Superior Court*, 171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670; *Swim v. Superior Court*, supra; *Le Clerg v. San Diego*, 218 Cal. 672, 24 P.(2d) 819.

It is therefore ordered that a peremptory writ of prohibition issue, requiring respondent court to refrain from further proceedings in the actions mentioned.



5 Cal.App.2d 415

HALEY et al. v. SANTA FÉ LAND IMPROVEMENT CO.
Civ. 9499.

District Court of Appeal, Second District,
Division 2, California.

March 21, 1935.

Rehearing Denied April 19, 1935.

Hearing Denied by Supreme Court
May 20, 1935.

1. Limitation of actions ⇨ 177(3)

Plaintiff suing for fraud more than three years after perpetration thereof is held to stringent rules of pleading and evidence, and must distinctly aver time when fraud was discovered and what the discovery is, so that court may determine whether by ordinary diligence discovery might not have been sooner made, and general allegation of ignorance at one time and of knowledge of another is of no effect (Code Civ. Proc. § 338, subd. 4).

2. Limitation of actions ⇨ 177(3)

Party seeking to avoid bar of limitation, in action for fraud must aver and show that he used due diligence to detect fraud, and if he had means of discovery in his power he will be held to have known it, and circumstances of discovery must be fully stated and proved (Code Civ. Proc. § 338, subd. 4).

3. Limitation of actions ⇨177(3)

Party suing for fraud more than three years after perpetration thereof must allege times and circumstances under which facts constituting fraud came to his knowledge so that court may determine from allegations of complaint whether discovery was within that period (Code Civ. Proc. § 338, subd. 4).

4. Limitation of actions ⇨199(2)

In action for fraud more than three years after perpetration thereof, whether there has been proper allegation as to discovery of facts constituting fraud within meaning of statute of limitations is question of law to be determined by court from facts pleaded; "discovery" and "knowledge" not being convertible terms (Code Civ. Proc. § 338, subd. 4).

[Ed. Note.—For other definitions of "Discovery" and "Knowledge," see Words & Phrases.]

5. Limitation of actions ⇨177(3)

Complaint by purchasers of lands to be used for planting avocado trees, for fraud by vendor in failing to disclose that soil was unsuitable for such purpose, *held* demurrable, where allegations as to circumstances surrounding discovery of fraud were insufficient to enable trial court to determine whether facts and circumstances leading to discovery of fraud existed for more than three years prior to commencement of suit (Code Civ. Proc. § 338, subd. 4; § 452).

6. Evidence ⇨13

As respects whether action commenced in 1932 for fraud in sale of lands in 1926 was barred by limitation, court would imply from averment that avocado trees were planted in 1927, that purchasers knew in 1929 whether trees were growing or had died, since court will take judicial notice that fruit trees properly planted for commercial production will either begin to grow or will not begin to grow (Code Civ. Proc. § 338, subd. 4).

7. Limitation of actions ⇨100(13)

As respects whether action commenced more than three years after alleged fraud was perpetrated was barred by limitation, discovery would be held to have occurred within three years if means of discovery existed and was readily available within that time (Code Civ. Proc. § 338, subd. 4).

8. Limitation of actions ⇨177(3)

Complaint for fraud which shows on its face that fraud was perpetrated more than three years prior to commencement of action must contain full and complete showing of times and circumstances under which facts constituting fraud were brought to plaintiff's knowledge, so that court may determine whether discovery of facts was within time alleged (Code Civ. Proc. § 338, subd. 4).

9. Pleading ⇨34(1)

In construing pleading, its allegations must be liberally construed with view to substantial justice between parties (Code Civ. Proc. § 452).

10. Limitation of actions ⇨100(13)

As respects whether action for fraud was barred by limitation because commenced more than three years after perpetration thereof, plaintiffs were put upon notice of falsity of defendant's representation as to suitability of soil for avocado trees when planted avocado trees began to die (Code Civ. Proc. § 338, subd. 4).

11. Limitation of actions ⇨197(2)

Proof that vendor failed to inform purchasers of presence of clay hardpan close to surface of soil which was represented to be suitable for avocado trees, after vendor planted trees for purchasers in 1927, did not amount to showing of diligence so as to entitle purchasers to maintain action for fraud in 1932, where most casual investigation could have revealed quality of soil (Code Civ. Proc. § 338, subd. 4).

12. Limitation of actions ⇨199(2)

Where defendant has pleaded bar of statute of limitations, motion for nonsuit should be granted if plaintiff's evidence shows that his action is barred (Code Civ. Proc. § 338, subd. 4; § 452).

Appeal from Supreme Court, Los Angeles County; Minor Moore and Lucius P. Green, Judges.

Action by Raymond R. Haley and his wife against the Santa Fé Land Improvement Company. Judgment for plaintiffs, and defendant appeals.

Reversed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

L. W. Butterfield and H. K. Lockwood, both of Los Angeles, for appellant.

Elliott & Aberle and Robert E. Moore, Jr., all of Los Angeles, for respondents.

WILLIS, Justice pro tem.

Respondents, plaintiffs below, brought this action against appellant to recover damages for fraud and deceit in a transaction involving the purchase and sale of lands. The transaction upon which the fraud is predicated took place about January 20, 1926, and the action thereon was commenced October 31, 1932. A general and special demurrer to the amended complaint was overruled, and defendant answered by general and special denials of all the essentials of the complaint,

and specially pleaded, among other defenses, the bar of section 338, subd. 4, of the Code of Civil Procedure, relating to actions for relief on the ground of fraud. Motions for nonsuit and directed verdicts were denied, and a verdict was rendered by the jury in plaintiffs' favor for \$18,000, upon which was entered the judgment herein appealed from, after motion for new trial had been made and denied.

Appellant presents on this appeal several questions, embracing claims of error (1) in overruling the demurrer, (2) in denying the motion for nonsuit, (3) in rulings on admission of evidence, and (4) in the giving and refusing of certain instructions. The major contention herein, in the first instance, involves the bar of the statute of limitations pleaded in the demurrer, and in the second instance involves the sufficiency of the evidence to overcome the motion for nonsuit predicated in part on the same statute.

The representations set forth in the complaint, in substance and effect, were that the soil of 18 acres of the 38 acres of land sold to plaintiffs was deep and fertile and well drained, and such part of the property well suited to growing avocados commercially; and that such conditions were shown by explorations and examinations of the soil by boring and taking samples from below the surface by experts employed by defendant. It is then alleged that these representations were false, and that in fact said soil was shallow and underlaid near the surface with a stratum of hardpan, or clay, or rock, or other substance which prevented proper drainage or left only a shallow stratum of soil from which the trees could derive nourishment and created a condition adverse to growing avocado trees, which caused said trees to shrivel and die for lack of nourishment in the soil and to become impoverished and barren of fruit and to perish and become valueless; that plaintiffs employed defendant to manage and cultivate the lands purchased and to improve the property and to plant avocado trees, and that for a period of one year and up to about June, 1927, defendant cultivated the soil and improved the property and planted avocado trees thereon, and did not at any time notify plaintiffs that said soil and land was any different from that which defendant had previously represented, or that said soil was not deep or fertile or well drained, and that plaintiffs had no means of knowing that said land was other than or different from that as represented until about the month of September, 1932; that said soil

conditions lay beneath the surface and could not be detected until the avocado trees were planted and began to grow and improvements placed upon the property; that plaintiffs were ignorant of soil conditions or of land suitable for growing avocados, and relied on defendant's representations that borings on the land had been made by experts which showed the soil to be deep, rich, and well drained; that avocado trees were planted and cultivated for several years prior to the disclosure of the conditions referred to; that plaintiffs noticed that the avocado trees were withering and dying; that they had not attained the growth and development that trees of similar age and cultivation under similar conditions in soil favorable to avocado cultivation had attained; that the fruit dropped off, and did not mature; "that when the conditions above mentioned first began to appear the plaintiffs employed the services of an expert who examined the property and the soil and drainage conditions, and who discovered the facts to be as herein alleged, and plaintiffs, for the first time, were informed of the soil conditions herein alleged on or about the 30th day of September, 1932."

By demurrer defendant challenged the sufficiency of facts stated to constitute a cause of action, and pleaded the bar of the statute of limitations supplied by section 338, subd. 4, of the Code of Civil Procedure, and also attacked the complaint for uncertainty and ambiguity in respect to (1) why plaintiffs had no means of knowing that said land was other than as represented until about the month of September, 1932; (2) when the avocado trees were planted upon said land and how many years they had been cultivated prior to the discovery of the conditions alleged; (3) when plaintiffs first noticed that said trees were withering or dying, or had not attained the growth and development that trees of similar age and cultivated under similar conditions in soil favorable to avocado cultivation would have attained, or when the fruit dropped off or did not mature; (4) when said conditions first began to appear to plaintiffs; (5) when plaintiffs employed the services of an expert; (6) when said expert examined said soil and conditions; (7) when said expert discovered the facts alleged; (8) why plaintiffs, having the care and control of the property from June, 1927, to September, 1932, did not discover any of the alleged facts which they claim indicated that said land was not as represented, until in September, 1932; (9) whether anything prevented an earlier investigation, and, if so, what; and (10) whether all

or only part of the soil of said 18 acres was not as represented by defendant.

[1-4] In cases where relief is sought from fraud, by action commenced more than three years after the perpetration of the fraud, the plaintiff is held to stringent rules of pleading and evidence; and especially must there be distinct averments as to the time when the fraud was discovered and what the discovery is, so that the court may clearly see whether by ordinary diligence the discovery might not have been sooner made. A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery it should be stated when it was made, how it was made, and why it was not made sooner. A party seeking to avoid the bar of the statute must aver and show that he used due diligence to detect the fraud; and if he had the means of discovery in his power he will be held to have known it. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite reasonable diligence. Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268. He must set forth the times and circumstances under which the facts constituting the fraud came to his knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within that period. Galusha v. Fraser, 178 Cal. 653, 657, 174 P. 311. "Discovery" and "knowledge" are not convertible terms; and whether there has been a proper allegation as to a "discovery" of the facts "constituting the fraud" within the meaning of the statute of limitations is a question of law to be determined by the court from the facts pleaded. Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809.

[5] Tested by the rules above laid down in the decisions cited, we are constrained to hold that the amended complaint in the case at bar is deficient, and that the trial court was in error in overruling the demurrers thereto. It may be conceded that the present complaint satisfies the requirements of the rule, in that it alleges that the fraud was discovered within three years of the commencement of the action and that the fraud was committed under such circumstances as to preclude any presumption of knowledge on plaintiff's part at the time of the commission. But as to the remaining essential to a valid and proper pleading, viz., allegations as to the circumstances surrounding the discovery of the fraud complained of, sufficient to enable the

trial court to readily determine whether or not the facts and circumstances leading to a discovery of the fraud existed for more than three years prior to commencement of suit, the allegations of the complaint herein are so meager and uncertain and ambiguous that it cannot readily be determined therefrom that discovery did not occur prior to such three-year period. The special demurrer unerringly and directly pointed to the defects in this respect, and as a special plea supplementing that embraced by the general demurrer it was sufficient to put plaintiffs on notice of such claimed deficiency in their complaint and of the danger of proceeding to trial on such pleading at the peril of a reversal on appeal from a judgment founded thereon. Even a casual reading of these allegations of the complaint, in the light of the special demurrer, produces the belief that there are dates, facts, and circumstances referred to as generalities in the complaint which, if set forth with particularity, would show whether or not the plaintiffs had knowledge, prior to the three-year period, of conditions of their avocado trees and the soil in which they were planted which the law would deem equivalent to discovery and whether or not there existed means of knowledge during such period which the court might hold to be knowledge itself.

[6, 7] Thus if plaintiffs, in view of and in connection with their allegation "that said soil conditions lay beneath the surface and were not discernible and could not be detected until the avocado trees were planted and began to grow, and improvements were placed upon the property," had stated when the avocado trees were planted and how long a time elapsed before they noticed them withering and dying, or when it was they noticed that the trees had not attained their expected and proper growth, or when the fruit began to drop off, then the court could readily determine whether or not plaintiffs had means of knowledge at such dates, and could connect those facts with the employment of the expert and have a date of his employment and of his discovery. Instead of supplying the above data, plaintiffs stated the several items as generalities and then alleged: "That when the conditions above mentioned first began to appear the plaintiffs employed the services of an expert who examined the property and the soil and drainage conditions, and who discovered the facts to be as herein alleged, and plaintiffs, for the first time, were informed of the soil conditions herein alleged, on or about the 30th day of September, 1932."

In reading the foregoing quoted allegation in connection with the other allegations of the complaint it is readily apparent that nowhere therein is it stated when the conditions "first began to appear," nor when the examination was made by the expert, nor when plaintiffs first had notice of the conditions referred to. The complaint simply states that "plaintiffs, for the first time, were informed of the soil conditions herein alleged, on or about the 30th day of September, 1932." Neither this last-quoted allegation nor any other allegation in the complaint operates to negative the proposition that plaintiffs had means of knowledge during the period between June, 1927, and October 31, 1929, when they had the care and control of the planted and growing vines. That such means of knowledge existed must be implied from the allegations of the complaint wherein plaintiffs aver that said conditions lay beneath the surface and could not be detected until the avocado trees were planted and began to grow and improvements placed on the property, when considered in connection with the allegations that up to June, 1927, defendant, in plaintiffs' employ, had cultivated the soil and improved the property and planted avocado trees thereon. As courts will take judicial notice that fruit trees properly planted for commercial production and given proper and necessary care will either begin to grow or will not begin to grow, it must be implied from plaintiffs' averment of planting prior to June, 1927, that they had knowledge during the succeeding period to October 31, 1929, as to whether such planted trees were growing or had not grown or had withered and died. If they had knowledge that the planted trees did not grow, it was incumbent on them as owners, in the exercise of a reasonable degree of care for their own property, to investigate the cause of such lack of growth. And if the means of discovery of that cause existed and was readily available at that time, the law says that discovery occurred.

In the absence of the necessary and material allegations reciting the times and circumstances leading up to and surrounding the discovery of the fraud herein, we cannot say that reasonable means of making such discovery were not available to the plaintiffs for more than three years prior to the commencement of this action.

[8, 9] We are aware of the pronouncement made in the case of *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243, and repeated in later decisions, that courts will not lightly seize upon some small circumstance to deny

relief to a party plainly shown to have been actually defrauded against those who have defrauded him, on the ground that he did not discover the fact that he had been cheated as soon as he might have done; but it is equally true that a complaint seeking relief on the ground of fraud, which shows on its face that the fraud was perpetrated more than three years prior to the commencement of the action, must contain full and complete showing of the times and circumstances under which the facts constituting the fraud were brought to plaintiff's knowledge, so that the court may determine whether the discovery of the facts was within the time alleged. *Goodfellow v. Barritt*, 130 Cal. App. 548, 20 P.(2d) 740. We are further mindful that since the enactment of section 452 of the Code of Civil Procedure it has been generally recognized that in the construction of a pleading for the purpose of determining its effect its allegations must be liberally construed, with a view to substantial justice between the parties. *Mix v. Yoakum*, 200 Cal. 681, 254 P. 557. Giving the amended complaint herein the most liberal construction permitted by section 452 of the Code of Civil Procedure, no intendment can be indulged in that the pleader has not stated his case as strongly as it was possible to do in order to avoid the bar of the statute of limitations. *Haas v. Greenwald*, 196 Cal. 236, 237 P. 38, 59 A. L. R. 1493.

[10, 11] That the construction of the complaint herein operates to render substantial justice between the parties is demonstrated by the case as shown by plaintiffs' evidence when the motion for nonsuit presented it for consideration in relation to the statute of limitations. For in the evidence appear the dates and circumstances omitted from the complaint, and which reveal the fact that in 1927 plaintiffs saw and knew that out of 375 to 400 avocado trees planted in 1926, 50 or 60 were dead by the spring of 1927, and that thereafter during the succeeding years to 1932 some trees continued to wither and die; that replacement trees also died, and in some instances plaintiffs abandoned growing of an avocado tree and replaced the dead avocado tree with an orange tree. The evidence further shows that the cause of the failure of the trees to live or grow was the presence of an underlying hardpan or clay deposit, which prevented proper drainage and proper root growth and feeding, and that this stratum of clay was only from four to fifteen inches beneath the surface, and in some spots plainly visible on the surface and also

visible in a cut bank on the premises. The evidence also revealed the fact that plaintiff Raymond R. Haley regularly visited the property about every two weeks after his purchase thereof, and in 1927, 1928, and 1929 at times did the irrigating, saw the condition of the dying or withered trees, and caused replacements to be made, and that it was not until September of 1932 that he employed the expert to make an investigation and report. When plaintiff observed the continual withering and dying of his avocado trees from the spring of 1927 and thereafter, natural curiosity as well as business prudence would have compelled him to make inquiry as to the cause thereof, and his failure to make it would be inexcusable negligence. If he did make inquiry, then he must have discovered the cause of his trees withering and dying. He must be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains. *Simpson v. Dalziel*, 135 Cal. 599, 67 P. 1080. Relying, as he might at the beginning, upon the representations of defendant's agents that the soil was deep and fertile and the drainage good, he was put upon notice of their falsity when the trees began to wither and die. *Stevens v. Suburban Fruit Lands Co.*, 109 Cal. App. 120, 292 P. 699. Nor does the allegation and proof that defendant failed to inform plaintiffs of the presence of the clay hardpan so close to the surface, when it planted the trees for them in the year prior to the spring of 1927, amount to any showing of diligence. That does not explain the failure of plaintiffs to inspect their own property then or thereafter with sufficient or any diligence, so as to reveal to them that which would be made apparent by a most casual or cursory investigation or inquiry. *Johnson v. Ehr Gott*, 1 Cal. (2d) 136, 34 P.(2d) 144.

[12] Where a defendant has pleaded the bar of the statute of limitations, a motion for nonsuit should be granted if the plaintiff's evidence shows that his action is barred. *Beeson v. Schloss*, 183 Cal. 618, 192 P. 292. As the evidence adduced by the plaintiffs was insufficient to overcome the plea of the statute herein, or to sustain any verdict in their favor, the motion for nonsuit should have been granted. These conclusions render it unnecessary to consider the other points argued in the briefs.

The judgment is reversed.

We concur: STEPHENS, P. J.; CRAIL, J.

HAMAKAWA v. CRESCENT WHARF &
WAREHOUSE CO. *

Civ. 9043.

District Court of Appeal, Second District,
Division 2, California.

March 19, 1935.

Hearing Granted by Supreme Court
May 16, 1935.

1. Appeal and error ⇨934(1)

In construing evidence to determine whether motion for judgment notwithstanding verdict should have been granted, all conflicts must be disregarded, and evidence must be viewed in light most favorable to party to whom such judgment was awarded.

2. Judgment ⇨199(3)

In action against stevedore by visitor to ship who was injured by bale of paper falling off balcony of dock warehouse when bale was struck by sling, evidence supported implied finding that visitor was on dock and at place where accident occurred as licensee, and that injury resulted from overt negligent act of stevedore's employee, warranting denial of judgment notwithstanding verdict.

3. Negligence ⇨32(1)

Where licensor was, or had good reason to be, aware of licensee's presence in place of danger, licensor is charged with duty of exercising reasonable care to avoid injury to licensee by any active or overt act of negligence.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by N. Hamakawa against the Crescent Wharf & Warehouse Company. Verdict for plaintiff, and from an order denying motion for judgment notwithstanding verdict, defendant appeals.

Affirmed.

George H. Moore, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Defendant appeals from order denying motion for judgment notwithstanding the verdict. Such motion was made after motions for nonsuit and for directed verdict had been denied and the jury had returned its verdict in plaintiff's favor.

Plaintiff, a fisherman, met a sailor friend who invited him to come to the boat Norfolk Maru, on which the sailor was employed, to see some goldfish which were for sale. In

company with two other friends plaintiff went to the wharf where the ship was docked. There was a warehouse which occupied about three-quarters of the width of the wharf for nearly its entire length, leaving a strip at one side one-quarter of the width of the wharf. The warehouse bore the name "City of Los Angeles" and the designation "Berth 230 D-E"; also the names "Luckenbach Lines" and "General Steamship Corporation." Defendant company had been hired as stevedore for the occasion by agents of the ship, and at the time was engaged in loading the Norfolk Maru with freight from a balcony of the warehouse which extended over the strip of open dock about five feet. While plaintiff was on his way to the boat a sling returning from the ship to the loading dock struck one of the bales of paper piled on the warehouse balcony which extended above where he was walking, causing the bale to fall upon and injure him.

[1] It is well settled that in construing the evidence to determine whether a motion for judgment notwithstanding the verdict should have been granted, all conflicts must be disregarded and the evidence must be viewed in the light most favorable to the party to whom such judgment was awarded. *Barthelmess v. Cavalier* (Cal. App.) 38 P.(2d) 484; *In re Flood's Estate*, 217 Cal. 763, 21 P.(2d) 579.

Plaintiff had parked his car near the warehouse and had walked out along the dock toward the boat, passing on the way a dock watchman employed by the General Steamship Company. Contrary to assertions of defense witnesses, plaintiff and his companions testified that there was no picket fence extending across the dock at a point opposite the forward end of the Norfolk Maru, and no other obstruction appears to have been interposed to free ingress and egress. No warning or "keep out" signs were posted, except: "No smoking. Positively No Parking of Automobiles on Municipal Piers." No watchman was employed by defendant, and no one told plaintiff or his companions to keep out, nor did any one question them. Two sets of railroad tracks ran the length of the open portion of the wharf, and plaintiff's witnesses testified that there was no freight on that portion where the loading was being done. A gangplank extended from about the center of the boat to the wharf. Just before the accident plaintiff had observed one load passing by means of a sling from the balcony to the ship, and waited for it to get by. He then started for the gangplank, the sling returned to the balcony, hit a bale of paper, and plain-

tiff was struck by the bale when it fell off the balcony. Defendant's employees declared they did not know plaintiff or his companions or any one else was present. No shout or other notice was given of impending danger.

Evidence was introduced that defendant had nothing to do with people coming or going on the dock when a boat was loading. It appears also that freight cars were shunted along tracks on the open portion of the dock traversed by plaintiff during unloading operations which were conducted from the balcony, and that General Steamship Company had general charge of and controlled the dock except as to the carrying on of work such as in this case.

[2, 3] There is evidence to support the implied finding of the jury that plaintiff was on the dock and at the place where the accident occurred as a licensee, and that the accident and injury to him resulted from an overt negligent act of defendant's employee. Under such implied finding the verdict is sufficiently supported and the court properly denied the motion for judgment notwithstanding it. *Herold v. Mathews Paint House*, 39 Cal. App. 489, 179 P. 414. Where the licensor was or had good reason to be aware of the presence of the licensee in the place of danger * * * [he] is charged with the duty of exercising reasonable care to avoid injury to the licensee by any active or overt act of negligence." *Lindholm v. Northwestern Pacific R. R. Co.*, 79 Cal. App. 34, 248 P. 1033, 1035. See, also, *Brigman v. Fiske-Carter Const. Co.*, 192 N. C. 791, 136 S. E. 125, 49 A. L. R. 773, and note at page 778. In *Sage's Administrator v. Creech Coal Co.*, 194 Ky. 415, 240 S. W. 42, 44, the court said: "The licensee, like the trespasser, must take the premises as he finds them. About the only essential difference is that the owner need not anticipate the presence of the trespasser, but often must anticipate the presence of the licensee. This duty of anticipating the presence of the licensee does not, however, impose any affirmative duty upon the owner of providing him a safe place, and he may revoke the license at any time; but it does place upon him the negative duty, so long as he permits the license to continue, of not doing any positive act that suddenly increases the hazard to the licensee of exercising his license, without reasonable notice to him of the increased hazard." In *Sughrue v. Booth*, 231 Mass. 538, 121 N. E. 432, under a set of facts comparable to the instant case, it was held that the defendant owed to the injured party "the duty of exercising due

care in unloading the cargo for the same reason that one traveller on a public way owes another traveller on the way the duty of exercising due care not to injure him."

Here defendant was not the owner, nor was it in exclusive occupancy of the premises. It appears that it had the right to use so much of them as was required for its work of stevedoring, but that it had no right to conduct its work in a manner which might imperil others without taking appropriate precautions by way of excluding or warning persons who might thus be in danger. The jury may well have concluded that, since there was a ship at dock with a crew on board or on shore leave, many of whom might be presumed to have friends on shore, and where access might be had along an open and unobstructed dock owned by the city and used by two or more steamship lines, defendant in the exercise of ordinary prudence and in the light of common experience must have anticipated the presence on the dock of persons other than its own employees, and should have used ordinary care to avoid injuring such persons even though they be mere licensees, and that under the facts of the case such care was not used and therefore defendant was liable for its negligent overt act and the injury to plaintiff thereby caused.

Order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



DOMESTIC & FOREIGN PETROLEUM CO.,
Limited, v. LONG et al. (RIFFEY et al.,
Intervenors). *
Civ. 8784.

District Court of Appeal, Second District,
Division 2, California.
March 2, 1935.

Hearing Granted by Supreme Court
April 29, 1935.

1. Mines and minerals ⇨55(4)

Deeds purporting to grant fractional interests or overriding royalties in all oil and other hydrocarbon substances produced from lands covered by oil and gas lease held to convey interests in the lease as distinguished from interests in oil well projected thereon.

2. Licenses ⇨18½

Deeds purporting to grant fractional interests or overriding royalties in oil and other hydrocarbon substances produced from the lands covered by oil and gas lease held not certificates of interests in "profit-sharing agreement" within Corporate Securities Act (St. 1929, p. 1251, § 2 (a), subd. 7).

Deeds conveying overriding oil royalties were not certificates of interest in profit-sharing enterprise within St. 1929, p. 1251, § 2 (a), subd. 7, since owners of overriding royalties receive same share of production regardless of profit of wells; a "profit" being defined as acquisition beyond expenditure or excess of value received over costs, and being ordinarily the net gain upon any business or investment.

[Ed. Note.—For other definitions of "Profit" and "Profit Sharing," see Words & Phrases.]

3. Licenses ⇨18½

Deeds purporting to convey fractional interests or overriding royalties in oil and other hydrocarbon substances produced from lands covered by oil and gas lease held not "certificates" within Corporate Securities Act defining "security" as including a certificate of interest in oil, gas, or mining lease (St. 1929, p. 1251, § 2 (a), subd. 7).

Word "certificate" in common parlance and as understood by those dealing in securities and as used in definition of "security" in section 2 (a), subd. 7, of the Corporate Securities Act (St. 1929, p. 1251, § 2 (a), subd. 7) does not include a deed, conveyance, or assignment, but means a written declaration or statement that person named therein is owner of one or more shares or interest in a series or issue of similar shares or interests in some property, profit-sharing agreement, business enterprise, venture, or speculation, with right to participate in net profits or dividends on pro rata basis with owners of all other like certificates of same issue.

[Ed. Note.—For other definitions of "Certificate," see Words & Phrases.]

4. Criminal law ⇨13

Statute creating crime should define it so clearly and definitely that person of ordinary understanding may know therefrom when he is violating its provisions.

5. Licenses ⇨18½

Deeds by individual co-owners of oil and gas lease, granting fractional interests or overriding royalties in oil and other hydrocarbon substances produced from lands covered by the lease, which deeds were executed in individual instances in ordinary course of business and not sold or offered for sale

to public, *held not of grantors' "own issue"* within Corporate Securities Act forbidding sale of any security of a company's "own issue" without permit (St. 1917, p. 675, § 3).

The word "issue," as used in section 3 of Corporate Securities Act (St. 1917, p. 675, § 3), means something different from words "make and deliver" which are ordinarily used in connection with deeds, conveyances, assignments, and other instruments not commonly known as securities. An "issue" when connected with or applied to securities ordinarily contemplates series or group of several of same class of transfers to be issued as series or group under scheme or plan offered to public and sold to any one who might be persuaded to buy.

[Ed. Note.—For other definitions of "Issue," see Words & Phrases.]

6. Licenses ⇨18½

Word "security," within Corporate Securities Act forbidding sale of security without permit, does not include deeds, conveyances, and assignments made bona fide in individual instances and conveying interests in oil and gas lease (St. 1917, pp. 675, 679, §§ 3, 12; St. 1929, p. 1251, § 2 (a), subd. 7).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

7. Constitutional law ⇨253

Limitations on right to acquire and possess property and dispose thereof must be based on police power, and exercise of police power to regulate conveyances of interests in oil leases under individual bona fide sales in ordinary course of business by requiring permit for such sale would have to be based on clear ground to be sustained.

8. Constitutional law ⇨48

Statutes ⇨174, 175

Construction under which statute will be both constitutional and effective should be placed on statute if that can be done without violence to language used.

9. Licenses ⇨18½

Purpose of Corporate Securities Act is to protect public against imposition of unsubstantial schemes and securities based on them (St. 1917, p. 673, as amended).

10. Licenses ⇨18½

Where deeds by individuals purporting to convey fractional interests or overriding royalties in oil and the like produced from lands covered by oil and gas lease were made and delivered bona fide in ordinary course of business in individual instances without sale or offer of sale to public, such conveyances *held* valid without permit from corporation commissioner or any other source, since not within contemplation of Corporate

Securities Act (St. 1917, pp. 675, 679, §§ 3, 12; St. 1929, p. 1251, § 2 (c) (3)).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Domestic & Foreign Petroleum Company, Limited, against James I. Long and others, in which C. W. Riffey and others intervened. From an adverse judgment, plaintiffs and interveners appeal.

Affirmed.

George E. Cryer, of Los Angeles, for appellants.

Newby & Newby and Earl A. Everett, all of Los Angeles (Charles R. Newby, of Los Angeles, of counsel), for respondents Long, Lewis and Jennie Chester, Samuel and Kathryn Gaede, Parish, and Driscoll.

CRAIL, Justice.

The sole question for our determination on this appeal is whether or not individuals may at all legally make and deliver, for value, instruments conveying interests in oil leases, without first having obtained a permit so to do from the commissioner of corporations. In the briefs it is said that this court must view the matter from first impression.

The facts which we deem necessary to a proper determination of this appeal are not disputed. In the year 1930, the individuals, who were at that time the owners of an oil and gas lease, for value, and without such a permit made and delivered to the defendants respectively instruments in the form of deeds, purporting to grant fractional interests or overriding royalties in and to all oil, petroleum, gas, and other hydrocarbon substances that may be produced and saved from the lands covered by the lease during the existence of the lease and all moneys derived from any sale thereof. None of these conveyances referred to a drilling contract in any way or obligated the grantees or any of them to bear any share in the costs of drilling, operating, or maintaining any oil well on the lease.

Additional details of the transactions are as follows: Two of the several owners of the lease conveyed all of their interests therein to the other owners, and each of these two received in exchange for his interest one of the instruments under discussion. Another of the instruments was given in payment of attorney's fees. The others

were given for services rendered by the grantees, respectively, in procuring the lease. Each of the instruments was made and delivered in the ordinary course of business. None of them was sold or offered for sale to the public. All of them were made in individual instances, in a bona fide way, without any intent or design of violating or evading any provision of the Corporate Securities Act (St. 1917, p. 673, as amended).

A permit was obtained by the owners of the lease to sell and issue a series or issue of securities which were offered for sale and sold to the public, some of them to the interveners, for the purpose of raising money to drill an oil well on the lease. These securities obligated their owners to participate in the costs and expenses of operation and maintenance and evidenced the right of their owners to share in the profits of the oil well to be drilled on the lease with the proceeds of sale of these securities. There is no claim, however, that these securities are invalid. Plaintiff has been operating the oil well on the leased premises ever since July, 1931, at which time the plaintiff acquired by assignment the leasehold estate subject to the rights of the defendants, the interveners, and others therein.

Plaintiff and interveners claimed at the trial and plaintiff now claims that all of the instruments were "securities" as defined by section 2(a), subd. 7, of the Corporate Securities Act (St. 1929, p. 1251, § 2(a), subd. 7), and that the instruments which were issued without having been authorized by permit are void. The trial court held otherwise, and entered judgment accordingly, from which judgment the plaintiff appeals.

Section 3 of the Corporate Securities Act (St. 1917, p. 675, § 3) as it existed at the time in question provided: "No company shall sell * * * any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." Section 16 of said act then provided (St. 1917, p. 679, § 12) and still provides (St. 1933, p. 2316, § 16): "Every security issued by any company, without a permit of the Commissioner authorizing the same then in effect, shall be void." Under section 2(a), subsd. 3, 6 (St. 1929, p. 1251, § 2(a), subsd. 3, 6) the word "company" includes individuals, but the word "individual" "includes only persons selling * * * any security for their own issue." Among the instruments included in the definition of a "security," section 2 (a), subd. 7, are "certificate of interest in a profit-sharing agree-

ment, certificate of interest in an oil, gas, or mining lease." The following also appears as part of section 2 of said act: "(c) Except as hereinafter expressly provided, the provisions of this act shall not apply to the sale of any security in any of the following transactions: * * * 3. The sale in a bona fide way of any security by an owner who is not the issuer or an underwriter thereof, who sells the same for his own account; and not for the purpose of evading the provisions of this act." St. 1929, p. 1251, § 2(c) (3). Section 14, now § 18 (St. 1925, p. 970, § 14; St. 1931, p. 950, § 18) imposes penalties for violation of the act "by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment." The amendment of 1929 changed the act in regard to individuals. The pertinent portion of subdivision 8 of section 2(a) of the act (St. 1925, p. 962, § 2(a), subd. 8) prior to the amendment of 1929, was as follows: "The word 'security,' in so far as it applies to 'individuals,' includes: (a) any instrument offered to the public by an 'individual' evidencing or representing any right to participate or share in oil, gas * * * minerals. * * *" By an amendment in 1931 (St. 1931, p. 938, § 2(a), subd. 7), the word "title" was added to "lease" in the definition of "security," so that "security" now includes any "certificate of interest in an oil, gas or mining title or lease."

[1, 2] Appellant contends that the conveyances to the defendants "are certificates of interest in a profit-sharing enterprise, to-wit: a projected oil well." The interests conveyed to the defendants are interests in the lease as distinguished from interests in the oil well thereon. "Profit is defined as 'acquisition beyond expenditure,' or 'excess of value received over cost.'" *Prince v. Lamb*, 128 Cal. 120, 60 P. 689, 691. Ordinarily profit is the net gain upon any business or investment. There are no profits in an oil well until after the costs of operation and maintenance and the rents and royalties and taxes and overhead are paid and deducted from the proceeds of the sale of the production. Defendants do not share in paying any of these expenses. The payments to them, on the contrary, are made as a part of these prior costs and expenses. As overriding royalty owners the defendants receive the same share of the production whether the wells show a large profit, whether they show a small profit, or whether they show a loss. The defendants do not have any

share in the profits of the well nor are their returns measured in any way by the profits of the well. So it is evident that appellant's contention that the conveyances to the defendants are certificates of interest in a profit-sharing enterprise is not supported by the facts in the case.

[3] It follows therefore that if the instruments under which defendants received title to their interests in the oil lease are securities it is because they are included in that phrase in the definition of the word "security" which says "certificate of interest in an oil, gas or mining lease." The first question which then arises is: Are the instruments by which defendants claim interest in the oil lease "certificates?" Ordinarily a grant deed is not considered a certificate. A certificate states a fact. "A certificate is a written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality been complied with." Black's Law Dictionary. Popularly, when used in connection with financial securities, the word "certificate" connotes a document in which the officer issuing the same purports to state on his authority as such that certain shares or participating interests are owned by some one named therein.

[4] No statute should be interpreted so as to make of it a dragnet to catch and make criminals of innocent, unsuspecting, and well-meaning persons who are engaged in business in an honest and bona fide way. A statute creating a crime should define it so clearly and definitely that a person of ordinary understanding may know therefrom when he is violating its provisions. "So important is the liberty of the individual that it may not be taken away even from the most debased wretch in the land, except upon conviction of a crime which has been so clearly defined that all might know in what act or omission the violation of the law should consist." In re Lockett, 179 Cal. 581, 178 P. 134, 135. Undoubtedly thousands of our citizens are making and delivering instruments evidencing interests in oil, gas, and mineral lands without securing permits therefor and without even the thought that such conduct might be in violation of the Corporate Securities Act.

Persons of ordinary understanding would not contemplate that grant deeds and other instruments conveying or assigning property rights are "certificates." We must not assume that the word "certificate" is as broad and inclusive as the words "any in-

strument" as used in the act prior to the amendment of 1929. We must not hold that the word "certificate" when used in a criminal statute, the violation of which is punishable with such severe penalties as in the Corporate Securities Act, includes such instruments as grant deeds.

The word "certificate," as spoken "on the street," as printed on the financial page, as understood by those who are accustomed to dealing in securities, and we believe as used in the definition of "security" in the Corporate Securities Act, means something quite different from a deed, a conveyance, or an assignment. As so used it means a written declaration or statement that the person named therein is the owner of one or more shares or interests in a series or issue of similar shares or interests in some property, profit-sharing agreement, business enterprise, venture, or speculation, with the right to participate in net profits or dividends on a pro rata basis with the owners of all other like certificates of the same issue. Certificates, indorsed in blank, pass by mere delivery and without transfer on the books of the issuer. The instruments by which the defendants obtained title to their interests in the oil lease lack many of these necessary characteristics. They are not certificates as "certificate" is used in the definition of a "security" in the act.

[5, 6] Many of the statements which we have made regarding the word "certificate" might be made with equal or even greater force with respect to the word "security." We shall not extend this opinion by needless repetition, and shall only say that the words deed, conveyance, and assignment are not used in the act in the definition of "security," and that a person of ordinary understanding would not contemplate that the term "security" would include such instruments.

We must also give due consideration to the word "issue" used as a noun in the expression "of its own issue" in section 3 of the act. This is the section which forbids the sale of securities without a permit. We are satisfied that "issue," as so used, means something entirely different from the words "make and deliver" which are ordinarily used with the words deeds, conveyances, assignments, and other instruments which are not commonly known as securities. An "issue" when connected with or applied to securities ordinarily contemplates a series or group of several of the same class of transfers to be issued as a series or group under

a scheme or plan, offered to the public and sold to any one who might be persuaded to buy. It is fair to assume that the Legislature had in mind this ordinary use of the word "issue." The instruments conveying interests in the oil lease to the defendants were not "of their own issue" within this common meaning of the word as used in the act under consideration.

If the Legislature had intended that the words "certificate" and "security" should include deeds, conveyances, and assignments, and had intended that the words "of their own issue" should mean the same as "make and deliver" as ordinarily used in connection with such instruments, it would have been a very simple matter to have said so in the act or in any of the several amendments. We do not say this by way of suggesting such an amendment, but for the purpose of indicating that we do not believe that the Legislature had any such intention.

[7] However, our objection to the narrow and harsh construction of the act urged upon us by the appellant cuts much deeper than the proper definitions of words and phrases. Generally speaking, all men under our system of government have the right to acquire and possess property and to dispose of it under an unimpeded barter. The limitations come under the reserved police power and are based upon the wholesome doctrine that the health, safety, morals, and welfare of the public generally are superior to the rights of the individual. The police power, however, may not interfere with these rights under the guise of "general welfare" or "regulation," although the California courts have gone a long way in support of such legislation holding that the courts will not inject their judgment where the subject-matter is susceptible to police power legislation. Certainly the reason would have to clearly appear to justify the injection of the police power into a situation such as we have wherein conveyances of interests in oil leases under individual bona fide sales in the ordinary course of business would be declared illegal and void.

[8] We are bound, moreover, in the interpretation of this or any other act to give it a construction which will be both constitutional and effective if it can be done without violence to the language used. In considering this question it is well to recall that the act was declared unconstitutional and void in so far as it attempts to require a person owning securities, of which he is not the

issuer or underwriter, to secure a broker's permit before he may lawfully sell such securities "in the course of repeated and successive transactions of like or similar character by him." *People v. Pace*, 73 Cal. App. 548, 238 P. 1089, 1091. Thereafter in 1929 the Legislature amended the act by eliminating from the definition of "security" the phrase "any instrument offered to the public by an individual," and by including in the definition of the word company "individuals selling securities of their own issue."

The elimination of the phrase "offered to the public" created considerable confusion in the minds of many, which confusion has crept out in this case, by giving the impression that individuals, since said amendment was adopted, may not under any circumstances without a permit legally make and deliver any conveyances evidencing an interest in oil, gas, or mining leases. But the purpose and effect of the amendment of 1929, in so far as individuals are concerned, was to limit the regulation of individuals to the sale of securities "of their own issue." By such amendment, individuals were put on a par in this respect with corporations and other companies because the sale of securities by a corporation or other company was already regulated in the same way by the words "of its own issue" in section 3 of the act.

[9, 10] The act should be considered all together with a view of arriving at its true meaning and intent. The whole tenor of the act is the regulation of the sale and the issue of "securities" under a scheme or plan where the public in general will buy. The purpose of such legislation is "to protect the public against the imposition of unsubstantial schemes and the securities based upon them." *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 37 S. Ct. 217, 220, 61 L. Ed. 480, 70 L. R. A. 1917F, 514, Ann. Cas. 1917C, 643. With this purpose in mind, the Legislature has sought to include within the definition of "security" all instruments which are of a character usually offered to or dealt in by the general investing public. But the use of the words "certificate" and "share" and "beneficial interest" and "or any other instrument commonly known as a security" and the expressions "of its own issue" and "of their own issue" in section 2 of the act indicates clearly that the Legislature did not have in mind to regulate private transactions where there is no offer to the public and where the transfers are made, in a bona fide

way, in individual instances in the ordinary course of business without design to evade the provisions of the act, such as were the transactions by which defendants herein obtained their interests.

Furthermore, if the contended for harsh interpretation of the Corporate Securities Act were the law it would be a veritable ball and chain on private transactions which do not in any way affect the public. Oils and minerals are classed as one industry, and, as such, is the chief industry of California. An act which would make it unlawful to sell or convey oil or mineral lands or leases, or any interest therein, by a company or an individual without first securing a permit therefor from the Commissioner of Corporations, would put the industry to intolerable delays, annoyance, and expense. It is common knowledge in California that oil companies and individuals buy and sell oil lands and obtain leases thereon and sell and transfer royalty interests therein in the ordinary course of business in individual instances with no thought of evading the provisions of the Corporate Securities Act. Pipe line companies buy the production from wells and leases on long-term contracts. Gasoline extraction companies contract for the natural gas from wells and leases, usually for the life of the wells or leases. These are of daily occurrence. Can we say that such transactions are invalid unless authorized by a permit? There is nothing inherently bad or reprehensible about the oil business and it yields to general rights as every other business yields to appropriate police restriction.

California is a rugged state with long ranges of high mountains, rich in minerals, and with rolling hills and broad valleys beneath the surface of which oil and gas has been and may be discovered. New mines are being opened up and new oil fields are being brought in, and who knows whether his land contains valuable minerals until a shaft is opened into it, and who knows whether oil and gas do not underly his lands until the drill has penetrated deep into the earth. If the Corporate Securities Act were given the narrow construction which would make it illegal and even criminal without a permit for the owner of oil or mineral lands in this state to lease or sell the same or any interest therein in good faith, in individual instances, without sale or offer of sale to the public, who would be so bold as to offer his lands or lots for sale? Who would risk the purchase of them? What dependence could be put in our titles? It would be an impos-

sible situation. The Legislature never contemplated that such an extreme and harsh construction would be given to the Corporate Securities Act.

A construction of the Corporate Securities Act such as we place upon it will protect individuals in their constitutional rights and at the same time make the act effective "to protect the public against the imposition of unsubstantial schemes and the securities based on them."

The case of the *People v. Craven*, 219 Cal. 522, 27 P.(2d) 906, presents no difficulty to a proper decision of this case. There was no claim in that case that the instruments sold and issued were not certificates. Indeed, that they were certificates seems to have been one of the facts to which defendant stipulated. The opinion in that case recites: "The defendant stipulated that he knowingly sold and issued the certificates of interest in the oil and gas leases in question and that he had not secured a permit therefor from the commissioner of corporations. * * * There can be no question but that the certificates of interest sold by the defendant were securities. We do not understand that the defendant contends otherwise." The defense was based upon the contention that assuming that defendant had sold certificates of interest which were securities still he was not guilty because the sections of the Corporate Securities Act under discussion in so far as they affected individuals were unconstitutional and void. The certificates of interest in that case were sold and offered for sale to the public with design to evade the Corporate Securities Act and in defiance of that act. And the court said: "There would have been no practical difference in so far as the transaction might affect the public had the defendant formed a corporation, sold to it his leases in exchange for its stock, and then sold this stock without securing a permit." In the instant case the instruments conveying interests in the oil lease to the defendants were not certificates, they were not securities as defined by the Corporate Securities Act, they were not sold or offered for sale to the public, and they were not of an "issue" of securities, and they were not sold with design or intent to evade the provisions of the act; all of which present an entirely different state of facts from that existing in the *Craven* Case.

From all of the foregoing, the conclusion is inescapable that conveyances of interests in oil leases are legal and valid, and need no

permit from the commissioner of corporations, or from any other source, if such conveyances are made and delivered in the ordinary course of business in individual instances in a bona fide way without sale or offer of sale to the public.

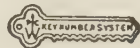
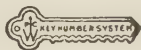
Judgment affirmed.

I concur: STEPHENS, P. J.

was herself guilty of negligence directly the cause of her being struck and injured. The question here is, therefore, not one of law but one of fact, upon which the determination of the trial court is conclusive.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 527

EDLUND et ux. v. RUHMLAND et al.

Civ. 9420.

District Court of Appeal, Second District,
Division 2, California.

March 26, 1935.

Appeal and error ⇨1010(1)

Judgment for defendants in pedestrian's action for injuries sustained when struck by automobile held conclusive on appeal, where it was amply sustained by evidence showing that injuries were proximately caused by pedestrian's own negligence.



Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by John V. Edlund and wife against Charles H. Ruhmland and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

John C. Miles and John L. Fleming, both of Los Angeles, for appellants.

Vernon M. Brydolf, of Pasadena, for respondents.

FRICKE, Justice pro tem.

Appeal from judgment for defendants in an action for personal injuries to appellant Hulda Edlund, who was struck by the automobile of respondent Jack Ruhmland while attempting to cross the street to go to her home.

While there was evidence which, if uncontradicted, would establish plaintiffs' cause of action, there was ample evidence that the collision was not proximately caused by any negligence on the part of the driver of the automobile, and that the plaintiff Mrs. Edlund

5 Cal.App.2d 582

BERG v. JOURNEYMEN'S PLUMBERS' &
GAS FITTERS' UNION et al.

Civ. 9605.

District Court of Appeal, First District,
Division 2, California.

March 28, 1935.

1. Appeal and error ⇨428(2)

Trial court's denial of motion to direct clerk to file copy of notice of appeal nunc pro tunc held not error, though supporting affidavits were uncontradicted, in view of unsatisfactory character of evidence recited therein (Code Civ. Proc. § 1847).

Counsel's affidavit merely stated that, to best of his recollection, knowledge, and belief, he filed notice of appeal in clerk's office on or about day as of which plaintiff sought to have notice marked and filed, but that affiant could find no office copy of such notice and had no present recollection of name of deputy clerk with whom it was filed, and that no notice of appeal was on file or entered on register of actions, while stenographer's affidavit merely stated that she had been instructed to prepare notice of appeal and remembered preparing and transcribing it, but was unable to find office copy after diligent search.

2. Appeal and error ⇨428(2)

Counsel's and his stenographer's vague, indefinite, and uncertain affidavits, containing no positive statements showing that notice of appeal was filed, but setting forth many circumstances tending to cast doubt on appellant's claims, did not bind trial court, in absence of counter affidavits, to find on motion to direct filing of copy of such notice nunc pro tunc that notice had been filed (Code Civ. Proc. § 1847).

3. Evidence ⇨594

General rule that trial court cannot disregard uncontradicted testimony is inappli-

cable, unless testimony is sufficiently positive to be satisfactory from such standpoint, and even positive, uncontradicted evidence may be disregarded under certain circumstances.

4. Appeal and error ⇨1012(1)

Credit and weight of testimony being for trial court to determine, appellate court cannot control trial court's finding or conclusion denying credence thereto, unless there are no matters or circumstances impairing accuracy of testimony.

5. Appeal and error ⇨428(2)

Motion to direct court clerk to file copy of notice of appeal from judgment, entered August 15, as of November 4 following, *held* properly denied for want of showing in motion or supporting affidavits that notice was filed within statutory time (Code Civ. Proc. § 939).

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action by Meda Berg, administratrix of the estate of Frank Broman, deceased, against the Journeymen's Plumbers' & Gas Fitters' Union and another. Judgment for defendants, and, from an order denying plaintiff's motion to direct the clerk of the court to receive and file a copy of a notice of appeal *nunc pro tunc*, plaintiff appeals.

Affirmed.

Joseph E. Isaacs and Alan H. Critcher, both of San Francisco, for appellant.

Laurenz J. Krueger and Alvin P. Jacobs, both of San Francisco, for respondents.

SPENCE, Justice.

In the above-entitled action, a judgment was entered in favor of defendants on August 15, 1933. In April, 1934, plaintiff made a motion "for an order directing the clerk of the court to receive and file a copy of the notice of appeal herein and to mark the same as having been filed on or about the 4th day of November, 1933." The trial court made its order denying said motion, and plaintiff appeals from said order.

[1] Appellant contends that the affidavits offered in support of said motion were uncontradicted and that the trial court therefore erred in denying said motion. We find no error in the trial court's ruling. The affidavits presented, although uncontradicted, were most unsatisfactory in character, and the trial court could properly consider the character of the evidence presented therein when ruling upon the motion. Code of Civil

Procedure, § 1847. Two affidavits were presented. The affidavit of counsel merely stated that "to the best of affiant's recollection, knowledge and belief, affiant filed said notice of appeal in the office of the clerk of the above entitled court on or about the said 4th day of November, 1933." It will thus be seen that said affidavit was not positive in its terms as to either the fact or time of filing. It further appeared from said affidavit that affiant could find no office copy of said notice of appeal; that affiant had "no present recollection as to the name of the deputy clerk with whom affiant filed said notice of appeal"; and that "no notice of appeal was on file in said papers or entered on said register of actions." The affidavit of the stenographer for counsel merely stated that she had been instructed to prepare a notice of appeal and "that affiant remembers preparing said notice of appeal and remembers transcribing the same." She also alleged her inability to find "the office copy" after diligent search. There was no statement in said affidavit as to when she prepared said notice or what disposition she made thereof.

[2] Appellant's contention that the trial court was bound, in the absence of counter affidavits, to find that the notice of appeal had been filed, cannot be sustained. There was no positive statement in said affidavits to show that said notice of appeal had ever been filed. On the contrary, said affidavits were vague, indefinite, and uncertain in several respects, and many of the circumstances set forth therein, including the failure to find an office copy, the inability to state the date of filing or the person with whom filed, and the fact that there was no record of filing in the clerk's office, all tended to cast doubt upon appellant's claims.

[3, 4] The general rule that uncontradicted testimony cannot be disregarded by the trial court is subject to many qualifications and exceptions. The rule has no application unless the testimony is sufficiently positive in its character to be satisfactory from that standpoint, and, even though the evidence is both positive and uncontradicted, it may be disregarded under certain circumstances. *Staples v. Hawthorne*, 208 Cal. 578, 283 P. 67; *Caldwell v. Weiner*, 203 Cal. 543, 264 P. 1100; *Michener v. Hutton*, 203 Cal. 604, 265 P. 233, 59 A. L. R. 480; *Blanc v. Connor*, 167 Cal. 719, 141 P. 217; *Davis v. Judson*, 159 Cal. 121, 113 P. 147; *In re Estate of Tompkins*, 123 Cal. App. 670, 11 P.(2d) 886; *Younger v. Younger*, 112 Cal. App. 445, 296 P.

1104; Cowan v. Hill, 109 Cal. App. 656, 293 P. 871; Worthington v. Peoples State Bank, 106 Cal. App. 238, 288 P. 1086. As was said in Hufstetler v. Dept. of Industrial Relations, 107 Cal. App. 741, at page 746, 290 P. 922, 924, quoting from 10 California Jurisprudence, 1145: "As it is within the province of the trial court to determine what credit and weight shall be given to the testimony, the appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony." We conclude that, upon the unsatisfactory showing made, the trial court was fully justified in determining that no notice of appeal had been filed.

[5] Furthermore, an affirmance of the order is required upon an entirely different ground. It will be noted that the judgment was entered on August 15, 1933, and that appellant sought by said motion to obtain "an order directing the clerk to receive and file a copy of the notice of appeal and to mark the same as having been filed on or about the 4th day of November 1933." The affidavits were equally indefinite as to the exact date of filing. Even if the trial court had given full credence to the affidavits, the order denying said motion was proper, for there was no showing that the notice of appeal had been filed within the time prescribed by law. Code of Civil Procedure, § 939.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



5 Cal.App.2d 235

**ST. JOHN'S CHURCH v. LOS ANGELES
COUNTY et al.**

Civ. 1130.

District Court of Appeal, Fourth District,
California.

March 13, 1935.

I. Constitutional law ⇨33

Constitutional provision exempting church property from taxation *held* self-executing (Pol. Code, § 3611, as amended by St. 1929, p. 1028; Const. art. 13, §§ 1, 1½).

2. Taxation ⇨191

Legislature is without power to either limit or extend exemption from taxation granted church properties by Constitution (Const. art. 13, §§ 1, 1½).

3. Taxation ⇨251

Assessor is not bound by affidavit filed in accordance with statute requiring institution claiming exemption from taxation for church property to file affidavit setting forth facts, but may determine facts through own investigations, and, if he makes mistake, error may be corrected by proper procedure (Pol. Code, § 3611, as amended by St. 1929, p. 1028; Const. art. 13, §§ 1, 1½).

4. Taxation ⇨191

While Legislature may regulate taking of proof in first instance and provide procedure for assistance of assessor in making up assessment roll, it can give him no authority denied him by Constitution, and it cannot make a constitutional exemption from taxation dependent upon conditions not imposed by Constitution.

5. Taxation ⇨251

While time limitation may be put upon action to recover tax illegally exacted upon tax exempt property, right to apply to courts for relief may not be arbitrarily denied, and failure to make proof as to nature and use of property before assessment roll is made up can give no validity to tax which is illegal.

6. Taxation ⇨193

Statute requiring institution claiming exemption from taxation for church property to file affidavit setting forth facts on penalty of being deemed to have waived exemption *held* valid as regulatory measure, and permitting, as penalty for failure to file affidavit, inclusion of property in assessment roll, with burden being placed upon owner to pay tax and then sue to recover it, but not to preclude recovery of tax, since statute, if so construed, would be unconstitutional (Pol. Code, § 3611, as amended by St. 1929, p. 1028; Const. art. 13, §§ 1, 1½).

7. Constitutional law ⇨48

Statutes ⇨174, 175

Statutes should be so interpreted as to make them constitutional and effective when possible.

8. Taxation ⇨251

Religious corporation having failed to comply with statute requiring institution claiming exemption from taxation for church property to file affidavit setting forth facts on penalty of being deemed to have waived exemption *held* not thereby barred from recovering such illegally exacted tax paid un-

der protest (Pol. Code, § 3819, and § 3611 as amended by St. 1929, p. 1028; Const. art. 13, §§ 1, 1½).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by St. John's Church against Los Angeles County and City of Los Angeles. Judgment for plaintiff, and defendants appeal.

Affirmed.

Everett W. Mattoon, Co. Counsel, Gordon Boller, Deputy Co. Counsel, Ray L. Chesebro, City Atty., and Joseph T. Watson, Deputy City Atty., all of Los Angeles, for appellants.

E. S. Williams, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The plaintiff religious corporation is the owner of certain real property which, with its improvements, is used solely and exclusively for purposes of religious worship; all being required therefor and the same having never been rented or any rent received. Taxes having been assessed against this property for the year 1930-1931, the plaintiff paid the same under protest, and within six months thereafter, and after demands made, brought this action under section 3819 of the Political Code to recover the amount paid. No issue was raised as to these facts, but the defendants in their answer alleged that the plaintiff had not made a return to the assessor accompanied by an affidavit, within the time and as required by subdivision 2 of section 3611 of the Political Code (amended by St. 1929, p. 1028). A demurrer to this answer was sustained without leave to amend, and from the ensuing judgment the defendants have appealed.

The sole question presented is whether, under subdivision 3 of section 3611 of this Code, which was added in 1929, a failure to make the affidavit required by subdivision 2 of that section between the first Monday in March, and the first Monday in July of a tax year, operates to waive the exemption and to prevent the recovery of taxes so assessed and so paid under protest.

Section 1 of article 13 of the state Constitution provides that all property in the state not exempt under the laws of the United States shall be taxed "except as otherwise in this Constitution provided." The ensuing six sections exempt certain property from taxation. The property here in question comes within the provisions of section 1½, which

provides that such property shall be free from taxation.

[1] We are of the opinion that the section last referred to is self-executing. In *Winchester v. Howard* (Rice v. Howard), 136 Cal. 432, 64 P. 692, 69 P. 77, 79, 89 Am. St. Rep. 153, the court said: "We must submit to this policy established in the fundamental law, and therefore every constitutional mandate which can be put in force without legislation must be held to be self-executing, unless a contrary intent is shown." In *Cooley on Taxation* (4th Ed.) it is said: "On the other hand, constitutional provisions declaring that certain property shall be exempt are self-executing and need no legislation to make the exemptions effectual." Section 650.

"In many, if not most, of the state constitutions, there are provisions expressly relating to the exemption of property from taxation. Some of these provisions, naming particular property as exempt, are self-executing so as to grant exemption without any action of the legislature." Section 661.

In this connection it is significant that the first subdivision of section 3611 of the Political Code (amended by St. 1929, p. 1028), which section is designed to carry into effect the constitutional provision and to regulate procedure in connection therewith, merely repeats the language used in section 1½ of article 13 of the Constitution. This language definitely declares that property so used is free from taxation and nothing therein suggests any dependence upon or necessity for any future legislation. As indicating that this section is self-executing, it may be observed that section 3611 of the Political Code was not adopted until nearly three years after section 1½ of article 13 became a part of the Constitution; that a similar provision in section 1½ of article 13 which was adopted in 1920, was in effect for thirteen years before any supplemental legislation was enacted; and that sections 1b and 1¼ of article 13 have for many years been carried out without the necessity of any legislation in connection therewith.

Property of the kind referred to in this section of the Constitution is not taxable, and no legislation is necessary to achieve this result. The assessor may ascertain the facts with respect to such property just as he must do with respect to any other property. If he erroneously or wrongfully includes the property in the assessment roll, his action does not make the same taxable. Legislation designed to assist the assessor in carrying out his duty with respect to such property may be proper for

that purpose, but is not essential in order to give effect to the constitutional provision.

[2] Property of this class is not only free from taxation, but, under section 1 of article 13, no authority exists for assessing the same. All of such property is exempted from taxation by the Constitution and the Legislature is without power to either limit or extend that exemption. *Pasadena University v. Los Angeles County*, 190 Cal. 786, 214 P. 868. The appellants argue that the 1929 amendment referred to is similar in effect to a statute of limitations. Under their interpretation, this amendment adds another condition not provided for in the Constitution and purports to provide that the property shall be exempt if a certain thing is done before a certain time while otherwise it is not. This is not merely a limitation, but the imposition of a new condition. Strictly speaking, there is nothing to be waived. Regardless of any purported waiver, the fact remains that under section 1 of this article no authority exists for levying such a tax. If, in fact, the property comes within the provisions of this section, its status is fixed, and it is not taxable, and, so far as the legality of any tax is concerned, we think this status of the property depends upon the facts in connection with its use and not upon anything that may or may not be done by the owner, or by the assessor.

[3-5] The assessor is not bound by the affidavit, if one is filed, but may determine the facts through his own investigations. If he makes a mistake, his error may be corrected by proper procedure. *Pasadena University v. Los Angeles County*, supra. While the Legislature may properly regulate the taking of proof in the first instance and may properly provide a procedure for the assistance and convenience of the assessor in making up the assessment roll, it can give to him no authority which is denied him by the Constitution, and it cannot make such an exemption dependent upon conditions not imposed by that fundamental law. Regardless of what is done by the owner, the tax assessed upon such property is illegal and void. The owner may lose his remedy by inaction on his part, but failure to take the proper steps to obtain relief adds nothing to the validity of the assessment. While a time limitation may properly be put upon an action to recover the amount so paid, like any other action, the right to apply to the courts for relief may not be arbitrarily denied, and the failure to make proof as to the nature and use of the property before the assessment roll is made up can give

no validity to a tax which is unauthorized and illegal.

Any such provision as that now under consideration can only relate to whether the property may be placed on the assessment roll in the first instance and cannot affect the question whether it is properly placed there. That question depends upon the actual facts which in turn determine whether or not the tax is legal. Any attempt to declare legal a tax which may not be imposed under the Constitution must be held ineffective. The legality of the tax does not depend upon whether or not an affidavit is filed but upon the facts in connection with the use of the property. Whenever assessed, such a tax is to be set aside, not because of the presence or absence of such an affidavit or because of any method used by the assessor, but because the property in fact was never assessable. The basic question is whether or not the property is taxable, and, while reasonable regulations may be made for the making of preliminary proof and while a failure to comply therewith may subject an owner of such property to the burden of making his proof in a more inconvenient and expensive manner, through an action in court, it cannot confer an authority to tax which has been expressly withheld by the Constitution. The authority to levy such a tax thus withheld cannot be acquired by a statute providing, in effect, that, if the owner does not claim the exemption before the assessment roll is completed, the tax will be levied.

[6, 7] If the amendment here in question be interpreted as merely a procedure to assist the assessor in originally making up his assessment roll, so that a failure to file the affidavit is to be deemed sufficient justification for the inclusion of the property in the assessment roll, thus placing upon the owner the burden of paying the tax and resorting to the procedure otherwise provided for recovering the same, the same is a proper regulatory measure and valid. On the other hand, if it was intended thereby to go further and to prevent an owner of such property from taking steps to recover the amount of such a tax, which was assessed and collected without authority and illegally, it must be held unconstitutional and void. When possible, statutes should be so interpreted as to make them constitutional and effective. Therefore we adopt the former interpretation rather than the latter.

[8] We conclude that the answer failed to set up a defense to the action and that the

owner of such a property is not prevented from recovering an illegal tax paid under protest in an action of this nature by the failure to file the affidavit required under section 3611 of the Political Code (as amended) within the time provided for therein.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.



5 Cal.App.2d 540

**PACIFIC INDEMNITY CO. v. PATHE
STUDIOS, Inc.
Civ. 9575.**

District Court of Appeal, Second District,
Division 2, California,
March 27, 1935.

Hearing Denied by Supreme Court
May 24, 1935.

1. Insurance ☞183

Where motion picture company requested insurance company to issue policy to complete picture company's compensation and liability coverage while picture was being made in Arizona with both California hired and Arizona hired employees, motion picture company held liable to insurance company for premium for insurance as to Arizona hired employees only, in view of another policy issued by same insurance company which fully protected picture company as to liability for employees hired in California, even though employees worked outside state (St. 1917, p. 831, as amended).

2. Insurance ☞183

Where compensation policy issued to motion picture company covering Arizona hired employees provided for sliding scale of premiums based on distance from place of work to nearest licensed surgical practitioner, determination of premium on finding that nearest licensed surgical practitioner was on Arizona Indian reservation, where he had been sent by federal government, held proper, notwithstanding that practitioner was not licensed by Arizona, since practitioner had been admitted to practice in other states, and was legally entitled to practice on reservation without Arizona license.

Action by the Pacific Indemnity Company against the Pathe Studios, Inc. From the judgment, the plaintiff appeals.

Affirmed.

Lobdell & Watt and J. Karl Lobdell, all of Los Angeles, for appellant.

Homer N. Boardman and Cosgrove & O'Neil, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff sued to recover premium alleged to have been earned by it for a policy of workmen's compensation insurance issued by it to defendant, and recovered judgment in the trial court for an amount substantially less than that prayed for in its complaint. From such judgment this appeal is taken by plaintiff on the ground that the award is insufficient.

Defendant had been carrying its compensation coverage under the California law (St. 1917, p. 831, as amended) with plaintiff for some time, when it determined to make a desert motion picture in the Western Navajo Indian Reservation in Arizona. Certain employees hired in California went over to that state, joined other employees hired in Arizona, and proceeded to make the picture. Before the project got under way, defendant requested plaintiff to issue a policy to complete its compensation and liability coverage while the work on the picture was being carried on. Details were not discussed, but a policy was issued which was adequate to cover contingencies arising by reason of the Workmen's Compensation Law of Arizona (Rev. Code 1928, § 1391 et seq.). When the undertaking was at an end, plaintiff asked payment of a premium which was calculated on the basis of insurance covering all employees at work on the picture in Arizona and at the rate prescribed by the law of that state, and this suit was instituted to collect that amount. A defense was interposed that plaintiff was already under contract to fully protect defendant as to liability to its employees hired in California, even though they worked outside of the latter state. The trial court took the view advanced by defendant, and awarded judgment for the premium for insurance as to Arizona hired employees only.

[1] Attached to and made a part of the California policy issued by plaintiff to defendant was an "endorsement covering operations outside of the state of California," which recited notice of the fact that defendant's employees would be called upon to go outside the

Appeal from Superior Court, Los Angeles County; Thos. P. White, Judge.

state to do some of their work, and, in consideration of the premiums set out in the policy, agreed to "indemnify the assured against loss by reason of liability to pay compensation benefits or to provide medical, surgical or hospital services as imposed upon or accepted by the Assured under the provisions of any statute law." The trial court found "that there was no consideration whatever on the part of plaintiff for the promise asserted by plaintiff to have been made by defendant to pay a premium on said Arizona policy, computed on earnings of California hired employees." Plaintiff was obligated under the California policy containing the indorsement quoted to protect defendant against liability to pay compensation benefits to California hired employees arising under the Arizona law. There was no reason why defendant should ask plaintiff to issue another costly policy insuring defendant against the identical risk already covered by the California policy. The only reasonable construction of the Arizona policy as accepted by defendant, in the light of the circumstances under which it was issued, was that it was intended to cover Arizona hired employees only. The finding of the trial court on that issue is obviously correct.

Interesting and important questions are raised by both parties involving the interpretation and application of numerous cases, including Alaska Packers Ass'n v. Industrial Accident Commission, 1 Cal. (2d) 250, 34 P. (2d) 716; Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A. L. R. 696; Ohio v. Chattanooga Boiler & Tank Co., 289 U. S. 439, 53 S. Ct. 663, 77 L. Ed. 1307. We have examined these authorities with care, but conclude that they are not applicable to the instant case by reason of the contract and finding above quoted.

[2] Under the Arizona policy, which the trial court properly concluded did apply to Arizona hired employees, a sliding scale of premiums was provided, based partly on the distance from the place of work to the nearest licensed surgical practitioner. The court found that there was such licensed surgical practitioner at Tuba City, Ariz., and fixed premiums thereon. That city is within the Indian reservation, and the surgeon had been sent out there by the United States government. He was well qualified by education and experience, and had been admitted to practice in the states of Washington, Oregon, and Illinois, but not in Arizona. Since emer-

gency treatment was the only service required which would make the proximity of a competent surgeon important under the Workmen's Compensation Act, and since the surgeon at Tuba City was legally enabled to practice his profession on the reservation without a license from the state of Arizona, the finding on this point was proper.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



**HALLA v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N et al. ***
Civ. 9655.

District Court of Appeal, First District,
Division 2, California.
March 25, 1935.

Rehearing Granted April 24, 1935.

1. Brokers ⇨4

Surety on real estate broker's bond held not liable for deceased broker's alleged conversion of moneys paid to him by principal for purchase of real estate, where only paper produced by principal was broker's receipt acknowledging payment to him by principal of \$3,000 (Civ. Code, § 1624, subd. 5; Code Civ. Proc. §§ 1967, 1973, subd. 5; Gen. Laws 1931, Act 112, §§ 2, 9a).

2. Evidence ⇨75

In action against broker's executor, presumption was that available evidence not produced by plaintiff was unfavorable to her (Code Civ. Proc. § 1963, subd. 6).

3. Executors and administrators ⇨221(4)

Plaintiff relying on circumstantial evidence to show that at time of his death decedent in equity and good conscience owed plaintiff certain money could not establish the debt, unless existence of debt was the only conclusion that could reasonably be drawn from facts proved.

4. Executors and administrators ⇨221(4)

Circumstantial evidence in action against executor of deceased real estate broker held insufficient to show existence of broker's indebtedness to principal where numerous transactions admitted of other inferences than existence of debt claimed (Code Civ. Proc. § 1963, subd. 7).

5. Trial ☞ 165

Nonsuit may be granted only when evidence, viewed most favorably to plaintiff, is insufficient to support verdict for plaintiff.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Francesca Halla against Bank of America National Trust & Savings Association and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

R. Lee Chamberlain and H. H. Linney, both of San Francisco, for appellant.

W. Urie Walsh and Herbert Kaufman, both of San Francisco, for respondent Bank of America.

Theodore Tamba, E. T. Hall, and Richard Pausch, all of San Francisco, for respondent Commercial Casualty Ins. Co.

STURTEVANT, Justice.

The plaintiff commenced an action to recover a judgment for money. She named as defendants Bank of America National Trust & Savings Association and Commercial Casualty Insurance Company. On the trial before the court sitting without a jury, after all the evidence had been received and both parties had rested, the trial court granted a motion for a nonsuit in favor of Bank of America National Trust & Savings Association, and also ordered judgment in favor of Commercial Casualty Insurance Company. The plaintiff made a motion for a new trial. Her motion was denied and she has appealed. In her complaint she alleged that she is a citizen of San Francisco; that the Bank of America National Trust & Savings Association is a corporation and is the executor of the last will and testament of A. Porta, deceased; that the Commercial Casualty Insurance Company is a corporation; that on the 2d day of January, 1932, there was issued to A. Porta a license to act as a real estate broker in the name of Progressive Realty Company, and, as a condition, A. Porta was required to file and did file with the commissioner of real estate a bond in the sum of \$2,000 executed by the Commercial Casualty Insurance Company and conditioned as required by law; that the contents of the bond were as stated in the document pleaded in *haec verba* in the plaintiff's complaint; that on the 8th day of February, 1932, " * * * plaintiff employed" said A. Porta as a real

estate agent to purchase for her certain real estate (not describing it) in San Francisco and paid to him \$3,000 to enable him to make the purchase; that A. Porta did not make the purchase but converted the \$3,000 to his own use; and that on the 10th day of February, 1933, plaintiff filed with the executor her claim for \$3,000 which it has not allowed. The claim is not set forth in the complaint, but the answers admitted the filing thereof. As to what may be the contents, the court is not advised.

[1] We will take up first the case as made against the Commercial Casualty Insurance Company. It contends that A. Porta could not be held on an agreement authorizing or employing him as an agent or broker to purchase or sell real estate for compensation or a commission unless the contract or some note or memorandum thereof was in writing and subscribed by the party to be charged or by his agent. Civ. Code, § 1624, subd. 5. We do not understand the plaintiff to contend to the contrary. She relies on the following facts: Commencing in 1929, she had business dealings with A. Porta. She advanced moneys to him and he advanced moneys for her account. Thereafter, on a date not appearing thereon, A. Porta signed a paper, "Received from Mrs. Francesca Halla on March 22, 1929, \$2,000. Received on February 8, 1932, from Mrs. F. Halla, \$1000." The plaintiff testified when that paper was handed to her she stated to A. Porta that the matter of loaning moneys was thereupon ended and that she wanted him to buy her a house and apply those moneys to the purchase price. She further stated that he agreed to do so. Continuing, she stated that at that time no particular property had been selected and that she proceeded to examine properties and continued to do so until the 29th day of October, 1932. At about that time she testified she inspected a house at Alabama and Twentieth streets and directed A. Porta to buy it. The only evidence regarding a written contract, if any, was as follows: "He (Porta) told me the price was \$3,550. I told him I couldn't pay more than \$3000 because that was all the money I had. I did not have any other conversation about the house. I signed three papers about the house. He took them. I signed those papers on October 29. They were regular papers for real estate business. They were the papers they used to buy a house—a contract. I was going to buy the house from Mr. Bruzza. The papers said that I was to pay \$3,250. His commission was to be \$250. I was to pay

the \$250 by getting the rents. When I collected the rents I was to pay him." Mr. Bruzza was called as a witness and testified that the day before Mr. Porta died he called on Mr. Bruzza to purchase the property at 847 Alabama street. Porta said that he had a lady who had given him money to buy the house. Bruzza stated that his price was \$3,500. Porta said that he had a check for \$3,300. They did not agree on a price and Porta said he would see him the next day. In the meantime he died. Until after Porta's death Bruzza never saw the plaintiff. There is not a particle of evidence of the execution of a writing under the terms of which the plaintiff agreed to buy and A. Porta agreed to negotiate the purchase for her of the property located at 847 Alabama street. There is not even oral testimony that such a document was ever signed by A. Porta, the party to be charged as a real estate broker. The evidence therefore is wholly insufficient. Civ. Code, § 1624, subd. 5; Code Civ. Proc. § 1973, subd. 5. Furthermore it must at all times be borne in mind that in this state it is statutory that such evidence is indispensable evidence. Code Civ. Proc. § 1967.

Section 2 of the California Real Estate Act (1 Deering's Gen. Laws 1931, Act 112, p. 25) defines a real estate broker. Section 9a of the same act requires that he furnish a bond. It further provides the condition of the bond. Such condition is not broad enough to say that it requires a real estate broker, as distinguished from other brokers, to pay his debts. The plaintiff relies on Clark v. Patterson, 213 Cal. 4, 300 P. 967, 968, 75 A. L. R. 1124. We think she has overlooked one of the important facts in that litigation. In that case the broker "made and delivered to appellant a purchaser's preliminary sales contract covering the property. * * *" Under such a set of facts no one would contend that a broker or any other agent was not liable for moneys so received and misappropriated.

[2-4] We pass now to the case as made against the other defendant. As from the beginning, both counsel agreed that as to the bank the plaintiff was not entitled to testify regarding any matter or fact occurring before the death of the deceased. Four documents which indicate the payment of moneys were produced from the possession of the plaintiff and introduced. Taking up each chronologically, plaintiff's Exhibit No. 3 is a statement reciting disbursements by the decedent down to April 9, 1930, which amount to \$210.44. He charges himself with "interest on \$2000 at 7% from October 1, 1929 to April 1, 1930,"

in the sum of \$70, which left a balance due plaintiff, \$140.44. He then wrote an addenda: "Received from Miss F. Halla \$140.50 as payment on house." No evidence was introduced showing what house. Plaintiff's Exhibit No. 4 is of like tenor. It shows payments by decedent of \$152.19. In an addenda thereto he charged himself with "interest \$35.00 from April 1 to July 1, 1930," and wrote a self-serving declaration: "Bal. due Progressive, \$117.19." On the main document he wrote: "Paid August 12, 1930." Plaintiff's Exhibit No. 5 is dated August 7, 1931. It shows a purchase or sale of \$7,900. From its face it may be inferred it was a purchase of real estate bought subject to existing bank mortgage, and that \$1,500 was paid. But by whom, plaintiff directly or by decedent for plaintiff's account? The record shows nothing to answer the question. On its face it acknowledges the receipt of \$100 for expenses, but it enumerates expenses aggregating \$103.10, bank interest \$15, and shows a balance due Progressive Realty Company of \$18.10. Then to that instrument there is an addenda: "Applied July 30 interest \$35.00"; he subtracts \$18.10, and the balance is \$16.90. He writes, "Paid in full, A. Porta." Paid by whom, himself or the plaintiff? The record does not show. If the interest mentioned was his interest payable to the plaintiff, the balance was properly struck, but as a receipt the document should have been signed by the plaintiff. If the interest was due decedent, he should have added instead of subtracting and the paper should have been signed by decedent. Finally, plaintiff's Exhibit No. 2 is: "Received from Mrs. Francesca Halla on March 22, 1929, \$2,000.00. Received on February 8, 1932 from Mrs. Halla \$1,000.00. A. Porta." There is evidence in the record tending to show the purchase by the decedent for the plaintiff's account of two or more different pieces of real estate and of the sale of at least one piece for her account, but the record does not give the facts nor dates of any one of the transactions. On January 29, 1934, the deposition of the plaintiff was taken. In it she testified that through the decedent she bought a house at 1372 Rhode Island street for \$5,200. She made that purchase four and one-half years before the date of the deposition, that is, about July 29, 1929. Mr. Ferrera became an employee of the decedent in 1930. He testified he knew the facts regarding the plaintiff's purchase through the decedent of the property at 1306 York street, but he was not asked to state the facts. Plaintiff's Exhibit 5 is dated Au-

gust 7, 1931. It shows the purchase or sale of property the price of which was \$7,900. It contains a detailed list of the expenses. As the purchaser usually pays such expenses, we assume the transaction was a purchase. The record does not contain any evidence giving any description of the property involved. The Rhode Island street property was sold. When and for how much the record is silent. At least one transaction, according to the exhibits, was conducted through a title company, but no representative of any title company was called as a witness. All deeds were presumptively placed of record, but such facts were not introduced in evidence. The record also discloses that from May 1, 1930, the plaintiff was indebted to the Hibernia Savings & Loan Society on a note bearing interest at \$29.33 per month and that the decedent had charge of the making and did make the payments. However no representative of the bank was called as a witness and the record does not disclose what payments, if any, were made after August 7, 1930. It will be presumed that the evidence on these outstanding factors which we have just enumerated would have been against the plaintiff (Code Civ. Proc. § 1963, subd. 6) if it had been introduced. Mr. Bruzza, the owner of the property at 847 Alabama street, testified that the day before the death of the decedent the latter called on him, asked his price, and stated that decedent made the remark he had a client who had already given him money to buy the property—two or three thousand dollars—and that she had no more money. No name was mentioned. The witness had never seen the plaintiff. He had heard a woman had called and examined the property. No contract was made, but Porta said he would return the next day. He died that night. The bank called as a witness an expert who testified he had examined the books and papers of the deceased for the purpose of ascertaining how the account stood between the plaintiff and the decedent. Among other things he testified regarding the purchase of another piece of property, 1372 Rhode Island street, for the plaintiff. The record showed that the price was \$5,400; that a mortgage in the sum of \$3,000 was assumed, leaving a balance of \$2,400. On that balance \$2,000 was paid as a deposit and a check for \$400. The record does not show who made the payments. The witness was unable to give the date. The same witness testified that the last-named property was later sold and on February 10, 1931, the deceased paid the plaintiff \$2,032.94. As we have shown in another place, the rec-

ord shows the Rhode Island street property was bought about July 29, 1929, hence the expert accountant's evidence is not helpful. The same witness testifying regarding the accounts as he found them stated that there would be a balance due the decedent of \$403.31. As to this defendant, the trial court granted a motion for a nonsuit. In effect the theory of the plaintiff was that in equity and good conscience the decedent, at the time of his death, held \$3,000 of her money which he should pay to her. 17 Cal. Jur. 602. She attempted to prove her case by circumstantial evidence. To do so, she was bound to meet the rule that is concisely stated in 10 Cal. Jur. 1157, as follows: "A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such nature, and so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true and yet they may have no tendency to prove the theory." From the evidence above set forth the trial court could find that on March 22, 1929, the decedent received from the plaintiff \$2,000. If that were all, the trial court could presume said sum was owing to the decedent. Code Civ. Proc. § 1963, subd. 7. But the evidence goes further and shows that he paid her interest to July 30, 1931; and that he received \$1,000 from her on February 8, 1932. But in view of the other evidence concerning sales and purchases, receipts and disbursements, it may not be said that the "only conclusion that can fairly or reasonably be drawn" from the facts is that the decedent at the time of his death still held for the plaintiff's account the said sum of \$3,000 or any part thereof. As these matters arose on a motion for a nonsuit after all of the evidence had been received, the rule governing the trial court is stated in *Bannister v. Los Angeles Ry. Corp.*, 203 Cal. 427, at page 429, 264 P. 756, 757:

[5] "The rule governing the power and propriety on the part of the trial judge in the matter of granting a nonsuit at the conclusion of the whole testimony in the case is clearly and correctly stated in the *Matter of Estate of Caspar*, 172 Cal. 147, 155 P. 631, wherein it is declared to be the rule that the right of the court to direct a verdict and the right of the court to grant a nonsuit at the conclusion of the evidence in the case are absolutely the same, and that the court may grant such a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is le-

gally entitled and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict were given." Giving consideration to the entire record, including the evidence, we cannot say the trial court erred in granting the nonsuit.

The judgment appealed from is affirmed as to each defendant.

We concur: NOURSE, P. J.; SPENCE, J.
CAL.REP.41-42 P.2d-40



